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# THE DOMINIONS AS SOVEREIGN STATES

*Their Constitutions and Governments*

BY

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**In Memoriam**  
**WILLIAM JOHN KEITH**  
**K.C.S.I., C.I.E., I.C.S.**  
**(1873-1937)**



## PREFACE

THE time seems at last to have arrived when the status of the Dominions can be set forth with a certain measure of assurance that no events in the near future will happen to disturb the essential principles affecting their place in the Empire or the Commonwealth. General Hertzog announced at the Imperial Conference that he had no fundamental issues affecting the constitution of the Commonwealth to bring forward, and in point of fact, in the absence of Mr. De Valera or any representative, no vital questions were presented for solution. Hence the time is appropriate for a fundamental revision of the doctrines presented in *The Sovereignty of the British Dominions* and *The Constitutional Law of the British Dominions*, issued in 1929 and 1933 respectively. The former work was written before the task of carrying into effect the principles tentatively formulated in the Report of the Imperial Conference of 1926 had been commenced by the experts whose Conference in 1929 preluded the decisions of the Imperial Conference of 1930. The latter dealt with the effect of that Conference and the far-reaching legal issues involved in the Statute of Westminster, 1931. Since then the terms of the Statute have been the subject of full investigation by the Privy Council, which has, directly or indirectly, set the seal of its approval on the important legislation promoted by Canada, the Union of South Africa, and the Irish Free State on the basis of the wide freedom accorded by the Statute. The sovereignty

claimed by General Herzog has been in essentials established, and the grounds for its recognition apply with equal force to the claim of Mr. De Valera now embodied with the assent of the Dáil in the remarkable Constitution of Éire. It is proper to note that the abdication of King Edward VIII. created conditions which enabled both these statesmen to demonstrate in striking form the reality of their assertion that their countries must now be deemed sovereign States.

But, while frank recognition of this sovereignty is necessary, it must be remembered that States may be sovereign without enjoying that plenitude and absolute simplicity of sovereignty which marks the German Reich. It is, therefore, still necessary to examine the character and nature of Dominion sovereignty, both in general and in respect of each Dominion, for the use of one style must not obscure for . . . the diversity of conditions and claims. It is, I am aware, often preferred in recent writing on the Empire to ignore such unpleasing questions as the divisibility of the Crown, neutrality, and secession, and to hold up the Commonwealth as an example, for the rest of the world or Europe at least to follow, of the reconciliation of distinct sovereignties in the quest of a single end, the promotion of the welfare of the peoples of the Empire. But such an attitude is at once unscientific and dangerous in practice. The American colonies were lost to the Crown, not, as suggested by Sir H. Page Croft, for lack of preferential trade which they had in full measure, but because their statesmen developed political theories which neither Lord Mansfield nor William Pitt ever understood, and to which therefore no effective consideration ever was given. Those who believe that the problems of Empire are already solved should reflect that during the Dáil debates on the Constitution of

Eire but three members out of 153 would vote in favour of an amendment to assert the connection of Eire with the Imperial Crown, and that the provincial elections in the Union of South Africa and the debates in Parliament show the steady growth of power of the Nationalists. Nor is it surprising that a party with clear-cut racial views should win adherents as opposed to a fusion the leaders of which have agreed to differ on the vital issue of the connection with the Crown, while concentrating their energies on the retention of office and on countering the growth of Nationalist influence by pressing forward a native policy wholly inconsistent with that for which General Smuts stood from 1910 to 1933. If no place can be found in a British Commonwealth for republics, then the enduring character of the Commonwealth may well be doubted. Nor is any solution even in sight of the Indian problem, either in its general aspect, which lies outside the scope of this work, or in respect of the possibility of the maintenance of political connection between India and Dominions which not merely refuse Indians entry into their territories, but deny them, though lawfully resident and born therein, equality of civil, economic, and political rights. Even in Canada, where the problem of French and British elements seemed to have approached solution, the appearance of a new movement, strongly racial, in Quebec dispels undue optimism in the belief that there are no unsolved problems of Empire.

Of the constitutional changes since 1932 the most striking are those in the Union and in the Irish Free State. Though the Constitution of Eire is in form revolutionary, its enactment was necessary, for a long series of amendments under Mr. De Valera's régime had overthrown much that was essential in the constitution of the Irish Free

State. Developments in foreign affairs have deeply affected the Dominions as members of the League of Nations, and have made the question of the future of mandates a living issue, accentuated for the Union by National Socialist propaganda of a wide character in South-West Africa, which has put some strain on the cordiality of relations with the Reich. The reaction of these developments on defence has not been unimportant, and the meeting, after an interval of nearly seven years, of the Imperial Conference is symptomatic of the realisation that mere isolation and the development of local autonomy are perhaps inadequate policies in a world suffering from an excess of political and economic nationalism. The absence of decisive or striking results from the Conference is not unexpected. The Governments of the Commonwealth meet therein for discussion and pooling of views, not to make decisions, the fruits of Conferences cannot be immediate, but they help to guide the trend of the policies of the several units of the Commonwealth. To ignore the real service of Conferences is as misleading as to exaggerate their importance and to compare them with the periodic consultations of closely allied States or ententes. The disappointment of New Zealand at the Prime Minister's long pilgrimage in the hope of achieving definitive results and his return without the attainment of his end is natural. But the success or failure of the Conference will become established only as events reveal whether the Governments of the members of the Commonwealth are sufficiently convinced of the dangers of political and economic nationalism to be able to induce their Parliaments to adopt policies calculated to promote a larger freedom of trade and the extension of international welfare and mutual understanding.

In deference to suggestions, I have added references in

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cases of doubtful legal issues to fuller discussions of the points in other more technical studies. To give the necessary detail in this work would have expanded it undesirably and have involved obscuring the main issues.

Since the above was written in June 1937, events have tended to accentuate the slight character of Imperial co-operation. In the Dominions, and especially in Canada, the surrender (February 20, 1938) of the Prime Minister to Signor Mussolini's ultimatum on the issue of negotiations has been received with deep anxiety. It is recognised that submission to a foreign demand, involving, as in the case of M. Delcassé in 1905, the removal of the Foreign Secretary, has inflicted a serious humiliation on the United Kingdom and has dangerously affected British prestige throughout the world, while strengthening enormously the Fascist powers. It is felt that the attitude of the Prime Minister (February 22) towards the League Covenant involves a grave departure from the principles laid down by the Imperial Conference, and that thus vitally to alter Imperial policy without the concurrence of the Dominions, and in a sense manifestly hostile to the views of the President of the United States, emphasises the necessity of Canada preserving absolute autonomy. It is found difficult to understand Lord Halifax's declared intention (February 24) regarding the recognition of the conquest of Ethiopia *de jure* in view of the "solemn undertaking" of members of the League under Article 20 of the Covenant "that they will not hereafter enter into any engagements inconsistent with the terms thereof". To minds unfamiliar with diplomatic exigencies it is difficult to bring conviction that breach of this rule is not incompatible with national honour, and Mr. Mackenzie King has stressed his adherence to the League Covenant. It is also strongly felt that the adoption of the

new policy, in face of the fact that the British Government at the general election of 1935 obtained a mandate for seeking collective security under the aegis of the League of Nations, without asking for a fresh mandate from the electorate, is contrary to the fundamental principles of democracy. Moreover, it is believed that the circumstances under which the negotiations have been conducted are such as will compel unwise concessions by Britain, which will further the acquisition by Italy of a commanding position in the Mediterranean, controlling the Suez Canal, and that, as an inevitable sequel, Britain will be so weakened in Europe as to be compelled to concede the claims, in themselves no doubt far better founded than those of Italy, of Germany for the restoration of her former colonies.<sup>1</sup>

While the result of this episode will strengthen the policy of Canadian isolation and reinforce the demand that a general election must precede any co-operation in foreign affairs with Britain, a new declaration of policy by Mr. Pirow, Minister for Defence of the Union of South Africa, suggests an extension of British liabilities. The ministry is already absolutely pledged to refuse to return to Germany South-West Africa, but to this on January 22<sup>2</sup> and February 23, 1938, Mr. Pirow added the doctrine that Lourenco Marques would be protected by the Union forces which he is creating against any attack; he specifically referred to an Oriental power, *i.e.* Japan, but unquestionably he is equally determined to prevent Germany obtaining possession of that territory. Taken in conjunction with the contemporaneous despatch of a British military mission to Portugal, this

<sup>1</sup> Cf. Keith, *The Scotsman*, Feb. 22, 24, March 1, 6, 10, 26, 1938.

<sup>2</sup> For a report of this speech I am indebted to Mr. C. W. A. Coulter, M.P., Cape Town.

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declaration suggests accord between Britain and the Union to enforce a Monroe Doctrine for South Africa, but no information on this head has been accorded by the British Government. Mr. Pirow, however, has admitted that participation in and a declaration of war must be decided by Parliament, though his suggestion that its view should follow that of the members—ultimately to number some 150,000—of the burgher commandos, evoked from the *Rand Daily Mail* on January 25 a protest against “Government by commando”, and revived the widely felt belief that Mr. Pirow has strong leanings towards establishment of Fascism in the Union, a view strengthened by certain evidence of hostility to the Jewish population on the part of the ministry.

Even more important has been the course of events in Ireland. The Constitution of Éire was approved at the referendum by a majority (685,105 to 526,945) which gravely disappointed its author, and without change became operative on December 29, 1937. On December 14, no doubt at the instigation of Signor Mussolini, Mr. De Valera announced his decision to reciprocate the action of the Duce in sending a Minister Plenipotentiary to Dublin by accrediting an envoy to Rome as Minister to the King of Italy, Emperor of Ethiopia, thus recognising *de jure* the conquest. It was in vain that Mr. Norton for the Labour party urged that the recognition of the conquest gave the lie to the whole structure of Mr. De Valera’s campaign for the freedom of Ireland from Britain and enunciated the doctrine of legitimacy of conquest, obtained in defiance of the League Covenant, the Kellogg Pact, and other accords, mainly, it may be added, by the use of illegal methods of war, including that of poison gas. Mr. De Valera’s action, apart from the motive of conciliating the Roman Catholic

hierarchy, which resented his failure to accord recognition to General Franco as the *de jure* Government of Spain, was doubtless influenced by the opportunity thus afforded of accentuating the sovereign independence of Ireland and the purely subordinate position of the Crown, the King being compelled to appear in the rôle of a King with Two Faces, recognising, for Ireland, the King of Italy as Emperor of Ethiopia, and, for the rest of his dominions, the exiled Emperor as sovereign *de jure*. It would patently have been much better had the Crown been omitted entirely from the transaction, and the State acted through its Prime Minister and Government alone, as was possible under either the Constitution of the Irish Free State or that of Eire.<sup>1</sup>

On December 29, 1937, the British Government announced that "they are prepared to treat the new constitution as not effecting a fundamental alteration in the position of the Irish Free State, in future to be described under the new Constitution as 'Eire' or 'Ireland', as a member of the British Commonwealth of Nations". At the same time it was made clear that the claim in Articles 2-4 of the Constitution was not recognised as involving any right to territory or jurisdiction over territory forming part of the United Kingdom, or as affecting in any way the position of Northern Ireland as an integral part of the United Kingdom. This declaration was not based on negotiation, but as regards recognition of the position of Eire in the Commonwealth was made in accord with the Governments of Canada, the Commonwealth, New Zealand, and the Union of South Africa. Naturally this acceptance of the unilateral abrogation of the treaty of 1921 was followed by an effort by Mr. De Valera to secure the surrender of Northern Ireland

<sup>1</sup> Cf. Keith, *Manchester Guardian*, Dec. 20, 1937; *The Scotsman*, Dec. 16, 27, 30.

as part of a settlement which would dispose of the question of the British claims in respect of land annuities and other payments withheld, terminate the tariff war so far as it remained, and give Britain assurances of immunity from risk of the use of Irish territory as a base for attack on Britain in lieu of the rights given as regards coastal defence under the treaty of 1921, which are inconsistent with Irish neutrality in war.

The project aroused just anxiety in Northern Ireland,<sup>1</sup> where it was realised that the people were being asked to sacrifice their membership of the United Kingdom for membership of a State whose citizens are not therein British subjects, and on whose territory the King could not enter, and to become a helpless minority in a State, dominated by the Roman Catholic Church, in which Irish is the national language, and in which flagrant disregard for the duty of protecting unquestioned legal rights has evoked strong protests from the judiciary.<sup>2</sup> The Premier wisely arranged an appeal to the electors, whence he emerged with 39 seats out of 52, while two were held by Independent Unionists, thus for the moment negating any effort on the part of the British Government to put pressure on the people to sacrifice their welfare and endanger their faith. But the fact remains that the British Government did not, in the discussions with Mr. De Valera, decline absolutely to listen to any demand for the separation of Northern Ireland from the United Kingdom, and did not insist that his only legitimate method of procedure was through negotiations with Northern Ireland. It must be feared, therefore, that the menace to the integrity of the United Kingdom remains. On the other issues accord should be possible, for the British

<sup>1</sup> Keith, *The Scotsman*, Jan. 15, 20, 1938.

<sup>2</sup> *Little v. Cooper*, [1937] I.R. 510, 512 *per* JOHNSTON, J.

Government has surrendered so much that further concessions can involve no sacrifice of principle.

It is a matter of minor importance that the Union and the Irish State have ceased to accept the extra-territorial jurisdiction of the British Crown over their nationals so far as that jurisdiction is for a time preserved in matters of personal status as defined in Article 28 in the annex to the Montreux Convention of May 3, 1937, regarding Egypt. The Egypt Order in Council, 1937, therefore, excludes such nationals from the civil jurisdiction of the British Court under the new régime. As regards Irish nationals the British declaration that Éire remains within the Commonwealth, despite the omission of any mention of that fact in the Constitution of Éire, establishes the doctrine that persons therein born still fall within the definition in the British Nationality and Status of Aliens Act, 1914, of natural-born British subjects as being born within the King's dominions and allegiance, even if in Éire itself they are not British subjects in Irish law. Though similar legislation to that of Éire on the issue of nationality is anticipated in the Union, its immediate passing is unlikely.

In announcing (August 25, 1937) the reasons which have induced the Commonwealth to decide to adopt Sections 1-6 of the Statute of Westminster, Mr. Menzies stressed his own doubts of the wisdom of the Imperial Conference Resolutions (1926-30) and of the Statute itself, on the ground that it substituted a dangerous legalism for an effective and fluid relationship; that it was essentially negative in emphasising the legal aspects of independence while ignoring the far more important family relationship; that a declaration of equality and political independence was difficult to reconcile with military dependence, and raised grave questions of the most-favoured-nation treaty

rights of foreign countries in respect of inter-Imperial preferences, and of the right of neutrality; if the Commonwealth degenerated into a mere friendly alliance of members, who might cast off their alliance to-morrow, their safety would be menaced. He urged that the problem of reconciling independence and unity had not been seriously dealt with so far, and demanded earnest study. Mr. Menzies has also committed the Government to a distinct refusal to accept the doctrine that Australia can, by ratifying Labour Organisation Conventions, override State Laws, despite the suggestions of the High Court in that direction, and his view is clearly in accordance with the spirit, if not the letter, of the Constitution.<sup>1</sup>

The new Senate of Éire has been constructed, after long disputes in the Dáil, in which the Government made a poor showing, in a manner equally elaborate and unsatisfactory. Nominations to the five panels are made by two members of the Dáil,<sup>2</sup> no member being able to propose or second more than one nomination. Other nominations are made by registered nominating bodies, whose claims to be suitable for this purpose are determined each year by a registrar, subject to appeal to an appeal committee of fifteen members of the Dáil elected by it on the principle of proportional representation. The number of members to be nominated by each body depends on the number of bodies registered and normally varies from two to four, each body having equality. To the administrative panel the Taoiseach, or any ex-Taoiseach, or President under the former régime, may nominate two members. The electors are members of the Dáil, and electors chosen on the basis of proportional representation by the county and county borough councils,

<sup>1</sup> *J.P.E.*, 1937, pp. 882-5.

<sup>2</sup> Seanad Electoral (Panel Members) Act, 1937 (Dec. 21, 1937).

seven by each. Voting is by post and by proportional representation with the single transferable vote. From the cultural and educational panel five members fall to be elected, of whom one must be from the Dáil sub-panel, and four from the nominating bodies sub-panel; in the case of the agricultural and labour panels six must be from the Dáil sub-panel and five from the other sub-panel, for the industrial and commercial panel the numbers are five and four, for the administrative four and three. The scheme seems needlessly elaborate, and Labour decided to boycott the election when it found that its power to nominate suitable candidates was rendered of little value by the admission as a nominating body of a society with no effective qualification to speak for Labour.<sup>1</sup>

In Australia efforts are being undertaken to weaken the resistance to Labour of the upper houses of the States. The Constitution (Reform) Bill of Victoria, which passed the Assembly on July 27 by 41 votes to 9, but failed in the Council to obtain an absolute majority, though accepted by 16 votes to 13, is moderate; on rejection of a Bill by the Council the Governor may dissolve, and, if the Assembly after the dissolution again passes the Bill not earlier than nine months since the second reading in the preceding session, it may become law despite the refusal of concurrence by the Council. But this procedure does not apply to a Bill to abolish the Council or to alter the provision in the Constitution Act for the salaries of the Governor or judges, or to alter this provision. The measure proposed also the reduction to 21 of the age of members, of the freehold property qualification from £50 to £25 annual value, and of the deposit of candidates from £100 to £50, and the

<sup>1</sup> Other supplementary Acts assign a seal to the President and regulate his relations to the army.

abolition of plural voting. On the failure of the measure to pass the Lieutenant-Governor accorded a penal dissolution which slightly improved the position of the Government, thus opening the way for the joint dissolution possible if the Council still fails to pass the measure. A settlement on some such lines seems clearly to be in accord with the general will.

On November 4, 1937,<sup>1</sup> Mr. Ogilvie, the Premier, urged the Assembly of Tasmania to accept a Bill applying to the Council the same rules as those enforced on the House of Lords by the Parliament Act, 1911. The matters excepted from the power of passage without the Council's assent if passed by the Assembly in three consecutive sessions, a period of two years having passed since the first acceptance of the Bill, were to be the extension of the life of the Parliament beyond five years or the abolition of the Council. This revolutionary proposal was advocated by arguments which were wholly irrelevant to the case of an elected upper chamber, and in the Council the measure received naturally summary dismissal. It is interesting that neither Victoria nor Tasmania has attempted to imitate the system in New South Wales under the Constitution Amendment (Legislative Council) Act, 1932, under which, while a money Bill can be passed, as in Britain, after a month over the head of the upper house, in case of disagreement on other measures a free conference of managers may be arranged, followed by a joint session without voting, and, thereafter, if no accord is reached a referendum decides the issue.

At the opening of the Union Parliament on February 11, 1938, the innovation was made of the reading of the speech by the Governor-General in Afrikaans as well as in English,

<sup>1</sup> A copy of his speech I owe to the Hon. J. H. Keating, formerly Senator for Tasmania.

and the National Anthem was followed by "Die Stem van Suid Afrika". General Hertzog, in defending from criticism by the Dominion party the innovation, excited the resentment of English members of the United party to such an extent that they remonstrated, and his view was explained (February 21) to mean only that he recognised the National Anthem in regard to the King to the same degree that he recognised the Union Jack; while "Die Stem van Suid Afrika" was the true national anthem of Dutch South Africa. The new arrangement accords, of course, with the steady predominance of the Dutch element in the Union. It is significant also of the movement to assert Dominion national status that Mr. Mackenzie King and Mr. Bennett have now both pronounced in favour of the creation of a national flag for the Dominion of Canada, a decision no doubt inevitable in view of the steady diminution of the British element as opposed to the French and other European elements in the population. It is essential to note, as a factor which must play a great part in the future development of Imperial relations, that in the Commonwealth and New Zealand alike, as in the United Kingdom, the period of a decline in the number of the population, apart from immigration, is fast approaching, while in the Union and in Canada the birth-rate of the Dutch and French and other European elements still more than suffices to maintain their numbers. This steady diminution of the British element proper throughout the Dominions is a factor rendering increasingly improbable any early or effective solution of the problem posed by Mr. Menzies of the union of *imperium et libertas*.

The latest appeal reported as decided by the Privy Council<sup>1</sup> must be admitted to render the maintenance of

<sup>1</sup> *Bosch and Another v. Perpetual Trustee Co. Ltd.* (1938), 54 T.L.R. 467.

the appeal in other than constitutional cases very difficult. It came to the Council by leave granted by the judge in equity of the Supreme Court of New South Wales, and the issue raised was the interpretation of a New South Wales statute, the Testator's Family Maintenance and Guardianship of Infants Act, 1916, in its bearing on the adequacy of sums of £15,000 apiece provided for two sons of a testator. This legislation has no parallel in English law, and the case was manifestly one to be settled in Australia, nor is it easy to find sufficient reason in their Lordships' judgment for their action in adding £10,000 each to the large sums provided for his sons by the discretion of their father, at the expense of the University of Sydney, and in mulcting the estate in the costs of all parties. No one can doubt that the High Court of the Commonwealth would be a far more satisfactory tribunal in such a case.

For much help in the preparation of *The Constitutional Law of the British Dominions* I was indebted to my late wife, and I owe now to my sister, Mrs. Frank Dewar, cordial thanks for her unfailing interest in this work.<sup>1</sup>

A. BERRIEDALE KEITH

THE UNIVERSITY OF EDINBURGH

February 28, 1938

<sup>1</sup> Following on the annexation of Austria by Germany on March 13, the natural sequel of the British surrender to Italy, Australia on March 24 announced an increase of £24,850,000 in defence expenditure over three years (navy, £7,750,000; army, £5,500,000; air, £8,800,000; munitions, £2,800,000); the purchase of two cruisers from Britain, which takes in part payment a seaplane carrier; the increase of the air force by 1941 to 198 first line machines; and strengthening of port defences, including those of Port Darwin. Canada on the same day announced total estimates for 1938-9 of 34 million dollars, a decrease of 2 millions, and Mr Mackenzie declared that Canada should refuse to imperil Canadian unity and security by accepting in advance the view that, when Britain was at war Canada was also at war. Canadian isolation has thus advanced virtually to the claim of the right of neutrality, just as Britain's

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policy (March 24) is that of facultative neutrality in Europe, save that Britain has obligations to France, Belgium, and Portugal, as well as Egypt and Iraq, and Canada is wholly free. British defence expenditure for 1938-9, £343,250,000, is to be further augmented. At present naval expenditure per head is Britain, 45s. 7d., Australia, 10s. 10d.; New Zealand, 9s., South Africa, 5.4d.; Canada, 44 cents.

The purely formal character of the connection of the Union of South Africa with the British Crown has been emphasised in the letters patent and instructions to the Governor-General of March 11, 1936 (superseding those referred to on p. 413), a fact which renders the renewed efforts of the Dominions Secretary to bring the Native Territories under the control of, and exploitation by, the Union wholly unjustifiable.

The Labour Government in New Zealand has restored to the electorate the full exercise of its political sovereignty by reverting to triennial elections even for the existing Parliament, an admirable recognition of the need of a constantly renewed mandate, as compared with the refusal of the British Government on April 4 to allow the electors to pronounce on the vital change effected in its foreign policy.

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PART I  
THE SOVEREIGNTY OF THE DOMINIONS



## CHAPTER I

### THE EVOLUTION OF THE INTERNATIONAL STATUS OF THE BRITISH EMPIRE AND OF THE DOMINIONS

#### I. *Historical Development*

ENGLAND was declared formally by Parliament<sup>1</sup> to be an Empire long before she possessed any external territories of consequence. The claim of Henry VIII. rested on the incontrovertible fact that his realm was wholly independent of any foreign sovereignty, and that he had successfully thrown off the burden of Papal supremacy in the field of ecclesiastical affairs. The attainment of oversea possessions added to her stature not to her status. By the union with Scotland, Great Britain succeeded to the independent international sovereignty which both countries had enjoyed; by that with Ireland the United Kingdom of Great Britain and Ireland became the sovereign unit. In 1921–2 the treaty of December 6, 1921, severed the Irish Free State from the United Kingdom, and in 1927 the Royal and Parliamentary Titles Act recognised the change by giving authority for the adoption of the new style of Parliament of the United Kingdom of Great Britain and Northern Ireland. But in the royal titles, as altered under that Act by royal proclamation of May 13, 1927, a geographical designation obscures the change. The King became “by the Grace of God of Great Britain, Ireland and the British Dominions beyond the Seas,

<sup>1</sup> 24 Hen. VIII. c. 12.

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King, Defender of the Faith, Emperor of India". But the essential unit, which continues without question or diminution the ancient sovereignty of Imperial rank in international law asserted by Henry VIII., is the United Kingdom of Great Britain and Northern Ireland. Nothing whatever has been done by the King in Parliament to diminish or alter that status which is recognised by all the powers of the world.

Though actual control over the overseas acquisitions of the Crown in the seventeenth and eighteenth centuries was often slight, and the colonists of Massachusetts almost at once denied the authority of Parliament over them, they were not prepared to claim absolute independence or international status.<sup>1</sup> The New England Confederation of 1643, though it at first was completely autonomous, and though it had some dealings with their French neighbours, never threw off allegiance, and the majority of the Federal Commissioners were ready to acknowledge that they were at war when the English Government was at war, and to attack New Netherland in 1652. On the restoration the Confederation shortly disappeared, and the Crown countenanced no assertion of independent authority in foreign relations, nor were the colonies anxious to do anything which might deprive them of royal protection against their French or Spanish neighbours. The position is shown clearly in the terms given to Penn as proprietor of Pennsylvania. Though he was given vast authority in internal affairs, he was forbidden to make war on the king's friends, to maintain friendly relations with the king's enemies, and he was to help the king in event of war. We have here the essential principles (1) that a colony is at war when the king is at

<sup>1</sup> Keith, *Const. Hist. of First British Empire*, gives authorities for the following paragraphs.

war; (2) that a colony must not make war of its own authority; and (3) that a colony must aid the king not merely in its own defence, but also so far as practicable in regard to the defence of other adjacent colonies. The same principles were naturally laid down for the Governors of the royal colonies, and they were adhered to during the whole period of royal control. In America that was rudely broken by the revolution and the final recognition in 1782–3 of the independence of the thirteen colonies.

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Naturally the revolt of the colonies was followed by a strong reaction on the part of the British Government, which felt that the disaster had been due to failure to exercise due control over the potential republics of the west, and a régime of strict supervision replaced that of *laisser faire*. The Imperial garrisons which had been refused before the revolution were now lavishly supplied, the funds which might have relieved Governors from dependence on their legislature and postponed the revolution were freely voted, and the bishops whose episcopal care might have created a loyal church were now readily consecrated and funds provided for their maintenance. Naturally the rule of strict subordination in the sphere of external relations was rigidly enforced, and readily accepted by communities which depended essentially for their possibility of peaceful development on the protection of the British fleet and army.

All foreign relations were thus under full British control which in trade expressed itself by the system of Navigation laws and by the regulation of tariffs for the colonies. It is very significant that, when the outbreak of rebellion in the two Canadas led to the famous mission of Lord Durham, that statesman in his report, while advocating responsible government, confined it wholly to the field of internal affairs. Foreign relations, including the control of external

Chapter I trade and of immigration, he reserved as obviously pertaining to Imperial authority together with defence. Even when free trade became in 1846 the essential principle of British policy for the colonies as well as for the mother country, it was not the intention of Lord Grey that that freedom should mean power of the colonies to discriminate in trade or to enter into bargains with neighbouring States. What he contemplated was a system of purely revenue tariffs which would offer no possibility of bargaining.

But this idea was soon dispelled by practical needs. The British ideal had forbidden, even before free trade was adopted, any differential duties, but Canada had need of the trade of the United States, and the British Government gave practical recognition of this need when it secured through Lord Elgin's activities at Washington the acceptance by the United States of the famous Reciprocity Treaty of 1854. While the treaty bore no Canadian signature, Lord Elgin as Governor-General was acting essentially as desired by his ministry, in accordance with the system of responsible government which had there been effectively established in 1847-8. The treaty was in form purely British, but it recognised that each part of the Empire was distinct in interests, and it definitely established the doctrine that it was proper that special treaties should be negotiated for any colonies which required them. When its expiry was approaching under notice given by the United States, efforts to secure renewal were freely made in 1865-6 by Canadian statesmen themselves in direct touch with representative Americans as well as through the British legation, but in vain. On the other hand, direct Canadian participation in treaty-making was achieved in 1871 in the Conference at Washington, which settled the dangerous grievances between Britain and the United States regarding the *Alabama* claims, and at the

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same time regulated issues affecting the North American fisheries and the navigation of the St. Lawrence. The Conference is interesting because Sir John Macdonald, the Canadian Premier, set an example often since followed, of representing the British negotiators as obstinately set on purchasing United States favour at the expense of Canadian interests. The assertion was mistaken, but it has passed into one of the accepted dogmas of Dominion history.

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Commercial interests also evoked action in Australia, where from 1869 to 1873 there was waged a struggle to secure the right of granting differential duties, prohibited by the constitutions. New Zealand was conspicuous in suggesting that power to arrange commercial treaties with foreign States might be accorded, but satisfaction was finally reached by the grant in 1873 to the Australasian colonies of the right to give inter-colonial preferences. These proved impossible to arrange. But in Canada efforts at securing special arrangements with foreign powers continued, though without much effect. Concessions, however, were made; it was agreed by 1884 that Canada might be represented specially in negotiations with foreign powers, the Dominion representative working together with, and signing any treaty reached jointly with, the British diplomat accredited to the foreign State with which an accord was sought. In 1893 Sir Charles Tupper reached the goal of his ambition in this direction when he signed at Paris a special trade treaty with France, though its terms were of little practical importance. On the other hand efforts to negotiate with the association of Canadian representatives treaties with the United States had failed, and the position of Canada in negotiations had, in her opinion, been weakened by the actions of Newfoundland, whose Premier, Mr. R. Bond, secured an accord with the United States which the British Government felt

Chapter I bound to refuse to accept in view of the strong objections of the Canadian Government.

The situation was difficult, but a method of securing the interests of the colonies was discovered as the result of Lord Ripon's reply to the proposals of the colonial Governments assembled at Ottawa in Conference in 1894. Lord Ripon on June 28, 1895, laid down principles which were to govern relations until the Great War. He held that (1) the colonies neither desired nor would it be possible to give them the treaty power, since that would result in the destruction of Imperial unity; (2) that separate treaties could properly be made with colonial co-operation for colonies which desired them; (3) that in such treaties colonies should not accept concessions from foreign powers which would operate detrimentally to the interests of other parts of the Empire; (4) that any concessions made to foreign powers should be extended forthwith to all other powers entitled by treaty to most-favoured-nation treatment; and (5) that such concessions should also be granted gratis to any other part of the Empire. This formed a body of principles inherently reasonable and long adopted without question as just.

Further extension of the power of making commercial treaties was conceded in 1907, for it was then agreed that it was no longer necessary to insist that a British negotiator should aid the Dominion representative in negotiation. British control was not abrogated, for the convention arrived at was to be signed by a British representative, and ratification was to take place after consideration of the convention by both Governments, and would be accorded only if the British Government were satisfied that the accord was in agreement with the principles laid down in 1895, which otherwise were deliberately reaffirmed as binding. But the Canadian Government of the day adopted a new form of

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procedure which negatived all control of this kind. It started informal negotiations, resulting in agreements with the United States, Germany, Belgium, and Italy in 1910, under which trade was regulated by Canadian statutes or authority given by them. This new procedure of governmental accords, in lieu of treaties made in the name of the King with the full participation of the British Foreign Office, was checked by its application to a new reciprocity agreement with the United States. The incautious hint of the President that the treaty might mean the parting of the ways in a political sense for Canada resulted in a revulsion of feeling, skilfully worked on by the opposition to Sir Wilfrid Laurier, and in Parliamentary obstruction which brought about the fall of the ministry through defeat in the general election by which it appealed for a mandate for its policy. It was felt that there were dangers in a mode of making agreements which resulted in an error of this kind, and the substitution of governmental accords for treaties received a definite set-back.

During this period Britain had continued to conclude general treaties on commercial subjects other than tariff bargains, which were precluded by the policy of free trade. The practice of automatic application of such treaties to the colonies went long unquestioned, largely because of their terms which normally were plainly advantageous to the colonies. But the position gradually changed as the colonies developed protection. Thus as early as 1877 it was decided to ask foreign powers to give the right to adhere within a certain period, usually a year in respect of any colony, and in 1899 the right to withdraw separately was for the first time conceded. There remained only the desirability of obtaining power to withdraw separately from treaties concluded before that date, and that was first conceded by

**Chapter I.** Greece in 1904 and later by nearly all the States. The system was completed in 1898, when after the Colonial Conference of 1897 and the definite offer of a preference by Canada, Britain sacrificed the commercial treaties of 1862 with Belgium and 1865 with the North German Confederation, which compelled any concession made to the United Kingdom to be extended gratis to these countries and to all countries entitled to most-favoured-nation treatment.

In matters not falling within the commercial sphere the British Government from the first adopted the doctrine that colonial interests must be fully considered in negotiations. This was applied as early as 1857 in respect of the difficulties affecting Newfoundland owing to the unfortunate concessions made to France in 1783 and to the United States in 1818. Difficulties thence arising were constant, and in 1891 consideration had to be given to the necessity of overriding Newfoundland legislation in order to secure the effective operation of the rights of France, but the colony after an appeal to the British Parliament had failed of full effect, accepted a compromise. In 1904 by surrenders of African territory Britain secured Newfoundland release from the more serious of her burdens to France. But in 1907 the intransigence of the islanders compelled the issue under a statute of 1819, passed to give effect to the treaty of 1818, of an Order in Council suspending the operation of certain Newfoundland legislation pending arbitration on the issue which had been agreed upon in principle. This exercise of paramount power was clearly justified; no Dominion accepted the Newfoundland Government's appeal for a protest, and the issue was ultimately solved by the award of the North Atlantic Fisheries Tribunal in 1910.

In the case of Canada relations never reached so serious an impasse, though there was, as we have seen, dissatisfac-

tion at the outcome of the Washington Conference of 1871, and very tardy recognition of the fact that its results had worked greatly for the advantage of the Dominion, which had been freed from the danger of American hostility by the settlement of the *Alabama* claims, albeit on terms wholly unjust to Britain. Canada later recognised that the failure of the fishery negotiations of 1888–9 was in no degree due to Mr. Chamberlain, and bitterness arose only over the award of the Alaska Boundary Tribunal. But the chief error<sup>1</sup> there was due to Canada's action in persisting in the selection of Lord Alverstone as one of the three Canadian representatives after the United States had appointed three convinced opponents of the Canadian claim. The episode, however, played its part in the growth in Canada of the desire to secure the treaty power, though that was not pressed by Sir Wilfrid Laurier, who preferred in lieu negotiations with consuls at Ottawa, which led ultimately to the reciprocity treaty with the United States above mentioned.

In Australia a curiously early demand was made by a Victorian Royal Commission on Federation for the concession of the treaty power, and for the neutralisation of the colonies. Various influences were at work, partly anti-British, for Mr. O'Duffy had had unfortunate experience of the defects of Irish government. But it was thought that in war Australia might be left poorly defended, and that, if neutrality as in the case of Belgium could be secured, the position would be far safer, while, rather naively, it was argued that as independent states the colonies could come to the assistance of the mother country if that proved desirable, a proposition naturally wholly inconsistent with neutrality. The proposal never received any serious measure

<sup>1</sup> This fact is quite inexcusably ignored in all discussions of British wrongdoing.

Chapter I of acceptance, but, as has been seen, New Zealand pressed at the same time, though in vain, for authority to make commercial treaties with foreign powers. Active interest in external relations was aroused in Australia in special over the risk of the German acquisition of part of New Guinea, and the British refusal in 1883 to adopt *ex post facto* the effort of the Government of Queensland to annex the territory in question was resented as a sign of British failure to recognise the importance of Australian interests. The episode was one of those which helped to strengthen the movement for federation, and after federation Australia was joined by New Zealand in protesting in 1906 against the convention regarding the New Hebrides which Britain made with France in order to prevent the possibility of German intervention in the islands. The issue was hotly discussed at the Colonial Conference of 1907, without much satisfaction to either side, and the question remains largely *in statu quo* at the present day. New Zealand had in addition a grievance very strongly felt, over the surrender in 1899 of the British claims in Samoa to Germany, failing to realise that the surrender was the price demanded by Germany for her disinteresting herself in the South African war.

But so far no Dominion had raised the question of Dominion participation in general foreign policy. The Hague Conferences of 1899 and 1907 were left to British care, and the busy treaty-making of the time which envisaged the ententes of 1904 and 1907 with France and Russia, and the conventions for the maintenance of the *status quo* in the North Sea and the Mediterranean evoked no sign of Dominion concern. But the Declaration of London, 1909, negotiated as a result of the decision at the Hague Conference of 1907 to set up an International Prize Court to which appeals would lie from national courts, was widely de-

nounced in Britain as dangerous to the Empire, whether as a neutral or a belligerent, and the complaints made were impressed on Dominion governments. The result, therefore, was a lively discussion at the Imperial Conference of 1911, but with merely the result that Britain readily promised consultation of Dominion views in preparing the agenda for future Hague Conferences, and circulation to the Dominions of treaties there arrived at where circumstances permitted before final acceptance. The same procedure was offered for like occasions; but no more was desired by Sir Wilfrid Laurier on the ground that consultation implied obligation to back up advice given, and New Zealand, the Union of South Africa, and Newfoundland were equally unwilling to be implicated in foreign affairs, though Mr. Fisher for Australia, where the Declaration of London had roused great anxiety, suggested that the Dominions might be placed into direct relations with the Foreign Office, a reform not yet *un fait accompli*.

So far, therefore, there had been no division of the unity of the Empire in point of form. Dominion negotiators might negotiate and sign treaties, but they acted as regards signature at least in every case with British representatives, and under the same powers to treat and sign, issued by the King on the advice of the Foreign Secretary, though of course the instance was that of the Dominion Government. Further, these powers were general, in no way limited in extent, and the result of any treaty was that it bound the Crown as a unity, though the obligation might be restricted, for instance, to Canada alone. Obligations thus contracted must, of course, primarily be carried out by the Dominion concerned, and at one time the United States had even gone so far as to state that it was not prepared to discuss issues arising out of such treaties with any save the British

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Government. That state of affairs had long passed away, but final responsibility for treaty execution still rested with the British Government, and any claims formulated by any foreign power against a Dominion or *vice versa* must be brought forward formally through the British Government, for Canada neither received nor accredited diplomats, and the use for consuls for quasi-diplomatic purposes was essentially informal.

A marked change took place in 1912 at the Radiotelegraphic Convention of that year. There for the first time delegates were appointed by the King on the advice of the Dominion governments, tendered through the Colonial and Foreign Offices, to act on behalf of the several Dominions. Special full powers were issued for each delegation while the British delegates received the ordinary unqualified full powers. In 1914 the same procedure was followed in the case of the Conference on the Safety of Life at Sea. The British Empire had thus been driven by the practical needs of the case to appear in a measure divided, and it was at any rate clear that primary responsibility for execution of any treaty must rest with the Dominion which accepted it under such a form of negotiation, even if the British Government might be involved ultimately.

## II. *The Consequences of the Great War*

The slow evolution of the position of the Dominions was unexpectedly accelerated by the events of the war of 1914–19.<sup>1</sup> The unity of the Empire as it then existed was shown by the fact that the British declaration rested on the authority of the British Government alone, though the

<sup>1</sup> Keith, *War Government of the British Dominions*, gives authorities for the following.

Dominions fully accepted the action taken. Throughout the war the supreme command in all matters of army, air force, and navy rested with the British chief command, and foreign relations were dealt with by the Foreign Secretary. But the Dominions were not excluded from a share in control. The device of the Imperial War Cabinet in 1917–18 assured them a voice in determining both defence and foreign policy, and General Smuts served continuously in the British War Cabinet. The decisive step, however, came at the close of the war when the insistence of Sir Robert Borden secured that at the Peace Conference the separate existence of the Dominions should be formally recognised, in lieu of a single Imperial delegation comprising British and Dominion delegates and dealing with all issues. That element of unity was not indeed wholly lacking, for by a system of rotation the British delegation of five included a Dominion representative from time to time. But each Dominion other than Newfoundland, which now definitely disappeared as entitled in foreign affairs to full Dominion status, was accorded distinct representation on the same scale as that awarded to the minor allied powers, though unity was so far preserved as to deny separate voting rights if a vote had to be taken, a matter of no practical importance. Further, when the treaty of peace was arranged, the Dominions obtained a measure of recognition in the form of signature. The British delegates, under full powers unlimited in area, signed for the British Empire, the others for the several Dominions. Sir R. Borden<sup>1</sup> would have preferred a limitation of the British signatures to those parts of the Empire which were under British control, but for that the time was not yet ripe. But he successfully insisted that the

<sup>1</sup> Keith, *Speeches and Documents on the British Dominions, 1918–1931*, pp. 15, 16.

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treaty must be ratified for the Empire only after it had been approved by the Dominion Parliaments. Yet another signal success marked his efforts. The Dominions were treated as entitled to membership of the League of Nations, and their distinct character from the Empire, which as such was accorded a permanent seat on the League, was recognised by formal admission of the right to stand for election as non-permanent members of the League. In the same spirit the position of the Dominions under the Labour organisation of the League was assimilated to that of all other member States. The achievement of complete status in the League was unquestioned, and it was further strengthened by the grant to the Dominions of the rank of distinct States under the Statute of the Permanent Court of International Justice (1920).

To complete his achievement Sir R. Borden aimed at securing for Canada the power of diplomatic representation, but this was clearly a very difficult issue, threatening Imperial unity directly, and the accord achieved<sup>1</sup> insisted on the maintenance of that unity and provided a special form for its assertion. The Dominion was to have its own minister at Washington who was to act in matters purely Canadian directly on the instructions of the Dominion Government. But he was to be in the closest touch with the British Embassy, and was to take charge of it on the absence on leave of the Ambassador. The project, accepted and announced in 1920, could not for the time be carried out. No Canadian wealthy enough to accept the position was forthcoming, and the appointment was left in abeyance.

But the difficulty of the lack of diplomatic representation was soon to make itself felt, when the United States Government issued invitations to a Conference at Wash-

<sup>1</sup> Keith, *op. cit.* pp. 38, 39.

ton which was to deal with the difficult issue of naval limitation and the position in the Pacific. There had been full consideration at the Imperial Conference of 1921 of the issue of the renewal of the Japanese alliance which had played so important a part since 1902 in British policy.<sup>1</sup> Canada, influenced by the United States, pressed for its discontinuance, while Australia, with greater appreciation of the position in the Pacific, had favoured its renewal subject to elimination of any terms suggesting even the possibility of a duty to aid Japan in the event of conflict with the United States. The problem seemed to be solved by the United States initiative, but some difficulty was felt by General Smuts when the invitations to the Conference were sent to the British Government alone. The United States Government stressed the fact that it was in diplomatic relations with Britain alone; but the matter was arranged satisfactorily enough, for the conventions arrived at, one of which secured a recognition of possessions in the Pacific, while another provided for limitation of navies, were signed and ratified on the model already used in regard to the treaties of peace and the other treaties thence arising. At the Conference,<sup>2</sup> however, the British and Dominion delegates worked as a unit, necessarily so, for in view of the quantitative limitation of naval strength any accord would have been unacceptable to foreign powers which left the Dominions free to engage in unregulated naval construction, which might of course merely have meant British construction disguised. A fundamental problem of Imperial Unity was thus raised and for the moment solved.

But progress was inevitable, and the Government of Mr. Mackenzie King in Canada took the lead. A Halibut Fishery

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 315-16.

<sup>2</sup> Keith, *Speeches and Documents on the British Dominions*, pp. 67-73

Chapter I.—treaty was duly negotiated by the Canadian Minister of Fisheries with United States representatives in 1923, but when the question of signature arose Canada put forward the claim that, as the treaty concerned Canada and Canadians only, it should be signed by the Canadian representative alone, without signature by the British representative at Washington. The issue was obscured in some measure by the fact that the terms of the treaty might be read to cover other than Canadian nationals, and that it could be argued that a British signature was not only necessary under the accords of 1895 and 1907 above mentioned, but was necessary to cover the application of the treaty to other than Canadians. But the British Government finally decided that the treaty affected Canada alone and should be signed for Canada alone, and the United States Senate finally accorded its approval of the treaty subject to this limitation. The Imperial Conference of 1923 approved the action of Canada by holding that a treaty which affected one part of the Empire only should be signed by a representative of that part and should be ratified on its request.<sup>1</sup>

There remained, however, the problem of the right, never yet limited, of the British Government to conclude treaties without the participation of Dominion delegates. An instance thereof occurred on January 23, 1924, when a treaty was arranged with the United States regarding the assistance to be given by the Empire in enabling the United States Government to cope with the illicit introduction of liquor into that country. But it must be remembered that the Imperial Conference of 1923 had approved the policy of aiding the United States, and therefore the fact that there was no separate signature for the Dominions was not calcu-

<sup>1</sup> Keith, *op. cit.* pp. 311-14, 319-21.

lated to give rise to any difficulty, and later in the *I'm Alone Case*, which involved the terms of that treaty, Canada admitted fully<sup>1</sup> that she was bound thereby, despite the fact that she had not signed. On the other hand, Canada raised a serious constitutional issue on the question of the negotiation and signature and proposed ratification of the Treaty of Lausanne. It is easy to understand how it came about that Britain decided to deal with that question without the participation of Dominion delegates, though the course taken was incorrect. But Canada<sup>2</sup> retorted by drawing a clear line of distinction between her position under treaties negotiated and signed by her delegates and other treaties. In the former case Canada was bound to carry out the obligation in full, in the latter the matter was very different. Mr. Mackenzie King did not contest the fact that the actual signatures, followed by ratification generally by the Crown, would be effectual to terminate the war still existing in theory between Canada as part of the Empire and Turkey, but he denied that Canada would be under active obligation to render aid, if the terms of the treaty regarding the Straits were at any time violated. The British Government did not attempt to contest this statement of the position and the ratification of the treaty followed on that basis so far as Canada was concerned.<sup>3</sup>

It was an obvious conclusion from this episode that separate diplomatic representation was a desirable object, and, though Canada still hesitated to act, the issue was dealt with by the Irish Free State, which had, with British support, applied for and obtained admission to the League of

<sup>1</sup> *Can. Bar Review*, vii. 407-10.

<sup>2</sup> Mr. Mackenzie King, in Keith, *op. cit* pp 322-41.

<sup>3</sup> The London Conference on Reparations in 1924 gave Dominion representation only on the panel system. This was criticised by Mr. Mackenzie King, *Can. Sess. Pap.*, 1924, No. 309.

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Nations in 1923. The State followed this up by the demand to be permitted the right to diplomatic representation in the United States as enjoyed by Canada, though not yet exercised by that Dominion. The issue was crucial. It might have been argued with some weight that the offer to Canada was based on the wholly special relations existing between that Dominion and the United States, and that it could not be transferred to the Free State, whose relations with the United States could not compare in importance with those of the Dominion. But this step was not taken. Instead the most important decision was taken to accept the Irish Free State claim. But the vital point of placing the British Embassy under the Irish Minister, in the case of the Ambassador's absence, could no longer be adhered to. Such a proposal would have been strongly opposed by Australia and New Zealand, and the Irish Government for its part had no desire to be mixed up with British affairs. Accordingly it was made clear that, while the Irish Minister would take charge of all affairs relating only to the Irish Free State, matters of Imperial interest or affecting other Dominions would fall to the British Ambassador.<sup>1</sup>

The position was now anomalous, and development inevitable. It was accorded by the Imperial Conference of 1926,<sup>2</sup> which revived the project of Sir R. Borden in 1919, and adopted the view that treaties should reveal clearly for what parts of the Empire they were concluded and should be signed by representatives of those parts, and ratified on the request of the governments of such parts as desired this to be done. It recognised also that there were common interests to be served. No part of the Empire might place upon any other part any active obligation without its consent. Each part which desired to enter into a treaty with a

<sup>1</sup> Keith, *op. cit.* pp. 349-51.

<sup>2</sup> *Ibid.* pp. 380-91.

foreign power should notify the other parts so that they could join in the proposed negotiation, if that were agreeable, or at least could notify how far their interests might be affected by the treaty proposed. The Conference touched upon, but naturally could not solve, the question already posed at Washington in 1921-2, of what treaties must be signed for the whole Empire. It recognised that such signature would be possible only if all the units agreed to be represented either by special delegates or by authorising some other delegation to act in its name, and it left it to the Governments, as occasion arose, to decide whether united action could be achieved. The matter which presented the problem in a definite form was the Locarno Pact of 1925.<sup>1</sup> It had been negotiated and signed without their co-operation because the circumstances rendered such co-operation impracticable, nor was it desired by any Dominion, for all of them were reluctant to take any step which might involve them in European issues. To safeguard the position of the Dominions, while the treaty was concluded for the King without limitation of area, it was expressly laid down that "the present treaty shall impose no obligation upon any of the British Dominions or upon India, unless the Government of such Dominion or of India signifies its acceptance thereof". The phraseology followed that of the tripartite accord of 1919, which was to have secured the co-operation of Britain and the United States for the defence of France from German aggression, with the substitution of Governments for Parliaments as the authority to accept the obligations. None of the Dominions, while cordially applauding the treaty which won Mr. Chamberlain the tactful gift of the Garter, would accept its obligation, showing thus how slight was the unity of the Empire even in so grave

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<sup>1</sup> Keith, *op. cit.* pp. 352-71.

Chapter I. an issue.<sup>1</sup> But the new form of signature of treaties was adopted as eliminating the possibility of the British Government having again to resort to the procedure by way of a general treaty with exceptions, which certainly implied that the British Government still had full power to bind by the signature of its representatives alone the Dominions.

The Conference also removed all doubts as to the validity of the diplomatic representation of the Dominions by according it full approval. The result was instantaneous, for, while the Irish Free State had not received the courtesy of the appointment of a minister by the United States at Dublin, the United States, on the appointment of a Canadian minister to Washington, necessarily reciprocated, and extended the same favour to Dublin. The régime of exchange of ministers was thus definitely inaugurated.

The Conference was followed by an instance where the new procedure, under which each Dominion was reckoned definitely a distinct entity in all international business, was put into full operation.<sup>2</sup> When the United States suggested that the United Kingdom should become a party to the general treaty which had been decided upon in lieu of a mere pact between France and the United States, the answer was given on May 19, 1928, that the treaty from its very nature was one in which the British Government could not undertake to participate otherwise than jointly and simultaneously with His Majesty's Governments in the Dominions and the Government in India. This view was accepted by the United States, and the Pact ultimately was

<sup>1</sup> The precedent was followed in 1936-7 when no Dominion accepted a share in British commitments to France and Belgium (Parl. Pap. Cmd. 5149 (1936) 5437 (1937)).

<sup>2</sup> Keith, *op. cit.* pp. 398-400: Pact for the renunciation of war.

signed and ratified<sup>1</sup> separately in the name of the King for Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League of Nations, for the Dominion of Canada, for the Commonwealth of Australia, for the Dominion of New Zealand, for the Union of South Africa and for India. It must be noted, however, that complete unity was not actually attained. Britain necessarily made a reservation as to the interpretation of the territorial limits of self-defence, which was well known to mean that Egypt and Iraq were to be deemed to fall within that sphere, but no Dominion formally repeated this limitation, and the Irish Free State emphatically negatived any such reservation. Canada and South Africa took a like view.

Unity, however, was still maintained in the London Treaty of 1930 for the Reduction and Limitation of Naval Armament,<sup>2</sup> at which under the precedent of Washington the Empire had to act as a unit in assigning naval strength. But the same measure of unanimity could not be achieved in the matter of the acceptance by the Empire of the Optional clause of the Statute of the Permanent Court of International Justice.<sup>3</sup> The Irish Free State persisted in including in its acceptance of issues on which compulsory arbitration was to take place disputes with the other members of the British Commonwealth of Nations. Indeed the State went so far as to express serious doubts whether the withdrawal of such disputes from the purview of the Court was competent under the Statute, a view naturally not shared by the other signatories. The Union of South Africa for its part made it clear that it thought that the Permanent

<sup>1</sup> There were six separate Acts, delivered at the same time, those of Canada and the Free State by their ministers at Washington, the rest by the Ambassador.

<sup>2</sup> Keith, *op. cit.* pp. 418-26.

<sup>3</sup> *Ibid.* pp. 410-17.

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Court was a proper court to deal with inter-Imperial disputes, but that it preferred to dispose of them otherwise. The same issue presented itself in 1931 in regard to the acceptance by the Dominions of the General Act of 1928 for the Pacific Settlement of International Disputes.<sup>1</sup> In this case the Free State insisted on claiming that the Act should apply to inter-Imperial disputes, while the United Kingdom and the other Dominions excluded them, the Union of South Africa, however, refusing to accept the Act.

So far, however, there had been a certain bond of unity in the fact that the formal procedure in international affairs necessitating royal action had regularly been carried through by the instrumentality of the Foreign Secretary. The accrediting of ministers, the issue of powers to sign treaties, the ratification of treaties, had all been accomplished by instruments bearing the royal signature and the British seals, and both full powers and ratifications had been issued on the specific authority of royal warrants countersigned by the Foreign Secretary. The Foreign Secretary had, of course, acted on the request, conveyed through the Dominions Office in normal course, of the Dominion Government concerned, but there was a certain difficulty in his position. Could he hold that his function was purely ministerial and that he was bound simply to act as requested? Or could he say in any case that the action desired was inconsistent with his duty to the King, and that he could not disclaim responsibility in the long run for any counter-signature or advice tendered to the King?

Needless to say, the issue was a very serious one, and it is foolish to treat it as pedantic, and to ignore the validity of the objections which could be taken to the maintenance of the procedure. That the British Government desired it to

<sup>1</sup> Keith, *op. cit.* pp. 435-41.

continue goes without saying, and naturally that Government stressed the fact that the authority on which action was taken was essentially that of the Dominion Government concerned. To have done otherwise would obviously have been to play into the hands of those who desired to negative any dependence on Britain. But naturally those who took this view could not ignore the actual authority which might on occasion be exercised by the British Government, and in any event the compulsory communication in advance of their actions and decisions to that Government, whose like action was still voluntary and under no form of Dominion control. That Canada, for example, saw advantages in maintaining action through the British governmental forms was a matter for Canada to decide, and similarly as regards Australia and New Zealand, especially as the two latter Dominions did not desire to incur the heavy cost of diplomatic representation overseas. But there was no compulsion on the Union or the Irish Free State to accept this view. At the present day to study history without constant regard to the vital significance of legal forms is out of date, and both the Union and the Free State were possessed of access to highly skilled legal advice.

It had proved hard enough to convince the outer world that the Dominions were really sovereign States of international law, and procedure by the use of British instrumentality was clearly a stumbling-block. It was inevitable, as the Irish Free State argued, that the practice should seem to derogate from the status of the Dominions, and the way for action was thrown open by a decision of the Imperial Conference of 1930<sup>1</sup> that the duty of advising the King in such a matter as the appointment of a Governor-General—up to then regarded as an Imperial function—rested with

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<sup>1</sup> Keith, *op. cit.* p. 221.

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the Government concerned, and that it could advise the King direct, without any intermediary. On this basis the Minister for External Affairs sought on March 19 an audience of the King and arranged with him that in future advice in matters of external relations should be tendered direct, and that there should be struck Irish seals to replace the use of the Great Seal of the Realm, the signet, and the cachet which is used to seal letters sent by one sovereign to another head of a State. Curiously enough, the vital change was never communicated by the Dominions Secretary to Parliament, which was left to obtain the information of the formal separation of the State from the United Kingdom from a press communiqué issued in Dublin. No doubt the ministry was anxious not to have its action criticised in Parliament, but the effort to avoid publicity can hardly be regarded as satisfactory to those involved in this fundamental change, of which the Free State naturally and properly was very proud.

The Union of South Africa followed suit by the Status of the Union and the Royal Executive Functions and Seals Acts of 1934.<sup>1</sup> The former measure vested all legislative power for the Union in the Union Parliament, and vested all executive power in internal and external affairs in the King, acting on the advice of his Ministers of State for the Union, providing for its administration by the King in person or by a Governor-General as his representative. The intervention of any British minister was thus clearly ruled out, and by the second Act due provision was made for the striking of a royal great seal<sup>2</sup> and a signet for the Union, which are used to seal all documents in place of the British

<sup>1</sup> Keith, *Journ. Comp. Leg.* xvi. 289-94.

<sup>2</sup> The Union has, of course, its own great seal used by the Governor-General (Letters Patent, 1909, Art. II, Government Notice No. 422 of 1911).

seals. Most significant perhaps was the provision that, whenever for any reason the King's signature to any instrument requiring the sign-manual cannot be obtained, or whenever the delay involved in obtaining his signature in ordinary course would either frustrate the object thereof or unduly retard the performance of public business, the Governor-General shall, subject to such instructions as shall be given from time to time by the King on the advice of his ministers for the Union, execute and sign such instrument on behalf of the King. The authority for such action must be given by the Governor-General in Council, the great seal of the Union must be affixed, and the instrument must be countersigned by a minister of State for the Union. It will be seen that under this provision there is authority for the Government to override a refusal of the King to sign. The Governor-General since 1930 has become an officer of the Union, appointed and removable by the Union Government, who cannot receive any instructions as to the exercise of his authority except on the proposal of the Union ministry. Thus the complete exercise of royal power in external affairs is vested in the Union Government.

In the Irish Free State the position, it will be seen, differed slightly, for there was no actual provision for the exercise of the executive authority in external matters except by the King personally, nor did the ministry desire to secure such power for the Governor-General, who was, under Mr. De Valera's régime, deprived even of the privilege of receiving the credentials of ministers accredited by foreign powers to the King as the head of the State. But, on the abdication of Edward VIII., power was taken by the Constitution (Amendment No. 27) Act, 1936, to exclude the King from all concern with the internal affairs of the State. In order, however, to retain membership of the British

**Chapter I.** Commonwealth of Nations, provision was made by the Executive Authority (External Relations) Act, 1936, under which the diplomatic representatives of the State were to be appointed on the authority of the Executive Council; consular representatives to be appointed by it or on its authority and international agreements to be concluded by it or on its authority. This left it open to the Executive Council to make use, for the purpose of appointing diplomatic representatives or consuls or concluding international agreements, of the King recognised by the United Kingdom and the other Dominions as the symbol of their co-operation, so long as he was used for that purpose by the other members of the Commonwealth. The result is that, while the Executive Council could make agreements without using the King and could deal with consular appointments, they were expected to act through him as regards diplomatic officers and the exequaturs issued to consuls as authority to exercise their functions. The transfer, therefore, of authority was not quite so complete as in the Union of South Africa.

In the new Constitution of Éire the matter is carried rather further, though much is left vague, to be completed by later legislation. The King entirely disappears *eo nomine* from the constitution together with the mention of membership of the British Commonwealth of Nations, which appeared as Article 1 of the constitution of 1922. But, while it is provided by Article 29 (4) that the executive power in regard to external affairs shall be exercised by or on the authority of the Government, it is also enacted that for the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may, to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or

adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern. This certainly indicates that under the new régime, accepted by the legislature and by plebiscite, the position of the Irish State will be much as under the Executive Authority (External Relations) Act, 1936. There is, however, another possibility. The constitution contemplates the grant of further authority to the President by legislation,<sup>1</sup> and leaves open, therefore, the way to vest in him the formal exercise at the instance of the ministry<sup>2</sup> of the whole of the executive power in external matters. The State could thus present itself to the world as acting through a President, without necessarily repudiating all connection with the British Commonwealth of Nations.

It is significant of the utter hollowness of the professions of the opposition under Mr. Cosgrave of desire to maintain connection with the United Kingdom that Mr. MacDermot's amendment to the constitution urging mention of the Crown found only three votes to support it. The episode shows clearly how hopelessly destitute the opposition is in leadership or statesmanship, and this fact explains the success of Mr. De Valera, despite the economic and other difficulties engendered by his policy of hostility to the United Kingdom, manifested by refusal to be represented at the Coronation or the Imperial Conference of 1937.<sup>3</sup>

Unity of action has inevitably been lacking in the Commonwealth attitude to recent European developments,

<sup>1</sup> Art. 13 (10).

<sup>2</sup> Art. 13 (11), as amended. The original draft contemplated the possibility of the grant of independent powers.

<sup>3</sup> See Mr. De Valera's speech in the Dáil, May 19, 1937, for his very curious explanation. The connection with the Crown is retained only in view of Northern Ireland.

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from which their inaction as to the Locarno Pact proved Dominion determination to hold aloof. Naturally no Dominion accepted responsibility to co-operate with France and Belgium, as arranged by these powers after the German military reoccupation of the Rhineland on March 7, 1936,<sup>1</sup> and repudiation of the obligations of the Treaty of Versailles and the Locarno Agreements. Nor were the Dominions parties to the accord of 1937 for the release of Belgium from her obligations under the Locarno Pact and the Agreement of 1936 to guarantee France and Britain from German aggression. It was more surprising that no Dominion save the Commonwealth participated in the Montreux Conference which on July 20, 1936,<sup>2</sup> released Turkey from the restrictions regarding the control of the Straits imposed by the Lausanne Agreement of 1923. The Commonwealth's action was prompted by the Australian interest in Gallipoli, and would doubtless not have been taken under a Labour ministry, for the Labour leader, Mr. Curtin, in his outline of policy at Adelaide on June 13, 1937, stressed the demand of Labour that Australia should stand aside from all external affairs; in the same spirit Labour in 1935 endeavoured to force Australia to refuse to share in sanctions against Italy and remain neutral, being defeated only by 27 to 21 votes.<sup>3</sup>

On sanctions, as will be shown in detail below, there was ultimately unanimity of action, due, of course, to the fact that they were provided for by the League Covenant and recommended by the League Council. But the unanimity

<sup>1</sup> Parl. Pap. Cmd. 5118, 5134, 5143, 5149.

<sup>2</sup> Cmd. 5249. No Dominion took part in the negotiations which produced the treaty with Egypt of Aug. 26, 1936 (Cmd. 5270, 5308), though they were fully informed, and at the Montreux Conference of 1937 on capitulations the British delegate spoke for Australia and New Zealand as well as India.

<sup>3</sup> J.P.E., 1936, pp. 58 ff.

did not last until the end. The British determination to abandon Ethiopia was protested against by the Union of South Africa at Geneva and accepted with deep reluctance by New Zealand; both Dominions realising the destruction of international law and security involved. The episode served to demonstrate the full independence of the Dominions in matters international of the utmost consequence, even involving the risk of attack by Italy.

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The same independence marked the efforts made in London in 1936<sup>1</sup> to secure the maintenance of the system of limitation of naval armament. Japan for various reasons had acquiesced in the treaties of Washington and of London in 1922 and 1930, which gave her a position of definite inferiority as a naval power to the United Kingdom and the United States. On irrefutable grounds of national prestige she refused to continue this system, and the possibility of quantitative limitation thus disappeared. This reduced one difficulty for the Empire, for the Irish Free State had notified her refusal to accept any longer the rule that for quantitative purposes the whole of the Commonwealth must be reckoned a single unit. Even as regards the qualitative restrictions agreed upon Free State action was refused, and the Union of South Africa also abstained from signing on the plea that there was no prospect of naval construction, a far from convincing ground for inaction.

In the difficulties arising out of the insurrection in Spain the attitude of the Dominions was naturally abstention from any interest save in the case of the Irish Free State, which accepted the non-intervention agreement and insisted on legislating to give it effect.<sup>2</sup> It must be admitted

<sup>1</sup> Cmd. 5136, 5137, and *Documents* (1936).

<sup>2</sup> Spanish Civil War (Non-Intervention) Act, 1937; Merchant Shipping Spanish Civil War) Act, 1937

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that the position of Mr. De Valera was difficult, for the opposition with its usual eagerness to seize on any plea to hamper him urged that recognition should be accorded to General Franco, and invited the Roman Catholic hierarchy to make common cause with it on the score that religion commanded the grant of support to General Franco with his Moorish troops and his German and Italian allies in the work of extirpating the enemies of religion, though how the devout Basques can be included in this category cannot easily be said. It is easy, therefore, to understand that no attempt was made to prevent the levying of General O'Duffy's Irish legion or its departure from Irish harbours, though the action was palpably illegal according to the Foreign Enlistment Act, 1870, which under the Constitution is part of Irish Law. But blame for this neglect falls equally on the Government of the United Kingdom, which only in January 1937 tardily awoke to its duty of enforcing the Act as regards departure from United Kingdom ports.

The abstention of the other Dominions from participation created lacunae in the British measures to enforce non-intervention, for it was impossible to apply the Merchant Shipping (Carriage of Munitions to Spain) Act, 1936, to ships registered in the Dominions or their territories, and the same limitation affected the Merchant Shipping (Spanish Frontiers Observation) Act, 1937. The anomalous position arose that Britain recognised that she continued to owe protection to Dominion ships even if they did not observe the rules laid down for other British ships, a situation whose danger was limited merely by reason of the fact that few Dominion ships used the waters involved. So anomalous was the position that on December 1, 1936,<sup>1</sup> Mr. Runciman, in dealing with the carriage of munitions to Spain, expressed

<sup>1</sup> 318 H.C. Deb. 5 s. 1053 ff.

the view that protection could not be accorded to Dominion ships violating non-intervention; but strong protests induced a hasty assurance by Mr. Eden<sup>1</sup> that the Admiralty still imposed on the navy the duty of defending Dominion ships in any event from attack on the high seas.

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<sup>1</sup> *Ibid.* 1100.

## CHAPTER II

### THE PRESENT STATUS OF THE DOMINIONS IN INTERNATIONAL LAW

Chapter II. (1) It is not disputed that the United Kingdom and all territories dependent thereon form a single unit for purposes of international law, and rank as one wholly independent and sovereign State. The position of India indeed is anomalous, inasmuch as India is given a place in the League of Nations and in many respects ranks as a distinct State. But to regard India as a full State in the sense of international law is impossible because for external purposes the Government of India is no more than an agency of the Government of the United Kingdom. All final power rests with the British Cabinet, and more immediately with the Secretary of State for India, under whom, even when federation is in full operation, the Governor-General will remain in matters respecting external affairs.<sup>1</sup> Nor is there any force in the argument that the United Kingdom is not a single State, because it acts on certain understandings with the Dominions in the matter of making treaties and conducting foreign relations generally. These understandings are of a constitutional character, in the view of the British Government, and have no international significance. But even were it to be held that they are agreements of international law, the fact would not diminish the British sovereignty if Britain is free, as in fact and by agreement

<sup>1</sup> Burma is in like condition since April 1, 1937, but is not yet in the League.

she is, to ignore the Dominions and to make treaties and take action in international affairs, so long as she confines her obligations to matters affecting Britain and the dependencies.

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A further question presents itself. Could the British Government now impose an obligation on a Dominion by means of a treaty which was signed by British representatives and ratified by the British Parliament without the co-operation of the Dominion Government? As we have seen, Canada did not dispute in 1924 that the Treaty of Lausanne was binding on her under international law, though she held that no active obligation to make good its terms was incumbent on her, since the compact had not been negotiated by Canadian representatives. But the Imperial Conference of 1926 insisted on the general principle that no part of the Empire could be bound save by its own consent,<sup>1</sup> and the British Government accepted that finding and has since steadily given it effect. The rule is now well known to foreign powers, and no question could arise regarding any treaty concluded since then, for it bears on its face precise indication of the territories to which it applies. If any treaty were concluded without precise indication, it would seem inevitable that any court would be bound to interpret it as applying only to those parts of the Empire over which the United Kingdom exercises control. Older treaties, of course, are in a different position. If they bind the Dominions when concluded, that obligation can be removed only by the conclusion of a new pact. Nor can it be claimed that the obligations of treaties can be extended by the existence of the new status of the Dominions; the rights of extra-territorial jurisdiction, for example, belong solely

<sup>1</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, p. 381, repeated in 1930, p. 427.

Chapter II. to the British Government, and when extinguished as in Siam, Albania, and Persia and now in Egypt by British action, they do not still exist to be claimed by Dominion nationals.

(2) The question then is whether the Dominions can claim to be sovereign States in the eyes of international law, and the question is no doubt not without some difficulty, due naturally to the process by which the Dominions have developed their statehood. A recent definition<sup>1</sup> of a State for international law stresses a permanent political organisation under the direction of officers capable of representing the group or community in the conduct of relations with the officers of other groups, and able to fulfil within the sphere of its acknowledged responsibility the duties of police and so to enforce upon the members of its polity a substantial observance of international law. The second requirement is that the group so organised shall be independent of foreign or external control, while thirdly there must be the possession of a defined territory which the government of the group controls and polices in conformity with the obligations of international law. If these criteria are applied to the Dominions, it would seem that they might at once be deemed to be full States of international law; but the author who enunciates them rather inclines to rank the Dominions with protected States, while pointing out that the Dominions possess real autonomy greater than that possessed by several of those recognised as enjoying in their own right the status of member States of international society. The question, therefore, evidently turns on the extent to which it can be said that the Dominions are protected or client States. Can they be said to be in the position of States which are in large measure free to manage their own affairs, but

<sup>1</sup> Stowell, *International Law*, pp. 34 ff.

subject to appeal to the paramount authority of a protector State?

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The question cannot be answered merely by reference to the position of the Dominions in the League of Nations. There is no doubt of their complete equality in that regard with all States which are members in all issues of importance. The most signal recognition of that position lies in the fact that in 1927 Canada was duly elected a non-permanent member of the Council, that in 1930 the Irish Free State, which was the first to agitate for election, received the desired place, to be followed by Australia in 1933 and in 1936 by New Zealand, so that there is now practically an understanding that the Dominions form a group, which is entitled to representation on the enlarged Council; India presumably will come to join that group unless it can claim special consideration as a great Asiatic power. Further, there has never been any doubt of the absolute freedom of the Dominions to adopt their own policy. That was decided from the first, and it is significant that it was in 1920 Dominion opposition which destroyed the promising suggestion accepted on the Council by the British representative that the League should set up an enquiry into the question of the access of all countries to sources of raw materials.<sup>1</sup> The Dominion attitude was naturally based on national sovereignty, but it may be doubted if in the long run the issue can be so simply disposed of. The Dominions again were the instigators of Sir A. Chamberlain in 1926 to a rather exaggerated protest against the desire of the Permanent Mandates Commission to have full information on British and Dominion policy in their mandated territories. In fact the information then asked for is actually given in

<sup>1</sup> So in 1929 and 1930 Dominion opposition to economic action by the League was marked, Chap. XVI (5), *post*.

Chapter II. the very elaborate reports presented by the mandatories.

Curiously enough the suggestion that the Dominions and the United Kingdom should pool views and co-ordinate efforts on issues on which they are agreed has been regarded with suspicion in the Dominions as involving some derogation from their autonomy. Nothing, of course, can be more distant from the truth. It is the regular policy of groups within the League which have common aims to pursue to take counsel together, and such action in no wise derogates from autonomy. The further argument that the separate membership of the League accorded to the Dominions receives in the eyes of other members justification from such exhibitions of divergence as occur would seem to suggest that the right of the Dominions to their places is dependent on their using their position to disagree with the United Kingdom, which would be a complete derogation from their autonomy.

The restrictions on the completeness of equality of the Dominions and other States are almost negligible. In one respect the League membership has not functioned wholly according to the original intentions of its authors, or at least some of them. The giving to the British Empire *eo nomine* a seat on the Council and on the Assembly was based on the procedure adopted at the Peace Conference when the British Empire Delegation included the representatives of the Dominions, though they had also distinct representation as separate units. *Prima facie*, therefore, the British Empire delegate would have spoken not merely for the United Kingdom and the dependent Empire, but also for the Dominions, and of course, under the present system of the Empire, the British representative on the Council must have in mind the interest of any Dominion as a matter of common concern to the Commonwealth. But apart from that it is understood,

though no formal change of the Covenant has been made, that the British delegate is really representative of the United Kingdom and all its dependent territories, including of course the Indian Empire, and the fact is more or less formally recognised from time to time. The essential point, however, is that no Dominion Government has any responsibility for what is done by the British Empire delegate on the League Council.

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One definite point of distinction between other States and the Dominions lies in the fact that the special connection of the units of the Empire is recognised. Under Article 15 of the League Covenant, where a report on a dispute between members of the League is made by the Council and is unanimously agreed to by its members, other than the representatives of one or more of the parties to the dispute, the members of the League are bound not to go to war with any party to the dispute which complies with the recommendations of the report. It seems clear<sup>1</sup> that this rule would be interpreted in the sense that the dissent of a unit of the Empire, in regard to a report concerning another unit which was a party to a dispute, would not be deemed to invalidate the unanimity of the report. In view, however, of the *débâcle* of the League over Ethiopia, the whole importance of such a report seems to be negligible, and, if ever the issue should arise, the recognition of Dominion independence may have reached the stage when a Dominion will be regarded as for every purpose distinct from the Empire. Any revision of the League Covenant would presumably remove the term British Empire as such.

Mention has already been made that the Dominions are distinct units for all purposes in the Labour Organisation of

<sup>1</sup> Mr. Rowell's admission in 1920; Keith, *War Government of the British Dominions*, p. 161.

Chapter II. the League, and in the Permanent Court of International Justice. One mark of Imperial unity, however, survives in the Court. The right of a party to a dispute which comes before the Court to have a national judge appointed to sit, if it has not a national already on the Court, may not apply to a Dominion when a British judge is sitting. The issue has not yet arisen for definitive solution, but the trend of opinion seems to be that express provision in the Statute might be necessary<sup>1</sup> to cover the point which is not dealt with by the last revision of the Statute. The right of a Dominion to have its own judge can very strongly be supported.

It is, however, arguable that the position of the Dominions within the League is no criterion for their general status in international law. This contention can be supported by the wording of Article 1 of the Covenant which runs: "Any fully self-governing State, Dominion or Colony may become a member of the League if its admission is agreed to by two-thirds of the Assembly, provided it shall give effective guarantees of its sincere intention to observe its international obligations". It must be admitted that the Article recognises very explicitly that a Dominion or Colony is not identical with a State, and that it is possible to maintain that the rights of a Dominion within the League are not rights under international law in general, but are rights given by a distinct instrument by contract for certain definite purposes. The rights so given are indeed of very high importance, but it may well be that, when the Covenant was framed, it was not the intention of those who framed it to admit that self-governing Dominions were in the strict sense States. It may, on the other hand, be pointed out that the Article hardly suffices to deny them statehood, and that in any case the position of the

<sup>1</sup> Cf. the discussion of March 19, 1929, on revision.

Dominions may have so developed that they are really States of international law. The question, however, clearly cannot be decided on the basis of the Covenant alone. It must be looked at from consideration of the whole international activities of the Dominions as they have developed since the Treaty of Versailles. This is the more necessary because parts of Dominion activities under League auspices take place in a form unlike that of ordinary treaty-making.<sup>1</sup> The League Labour Organisation secures the drafting of conventions, which are not ratified in treaty form in the name of the King, but by the Governor-General in Council's authority for each Dominion, and the delegates to these Conferences do not act under royal full powers, but under authority granted by the Governors-General in Council. Moreover, at one time there was a tendency to conclude agreements at Conferences called under League auspices in the form of agreements between countries, one being the British Empire, which obscured the separate personality of the Dominions. The Imperial Conference of 1926 deprecated this form of procedure and asked for that by heads of States, and this view was duly communicated by the British Government to the League Council.<sup>2</sup>

(3) It is best, therefore, to consider the question of Dominion status apart from their position as members of the League of Nations, especially as there is far wider agreement that in the League they enjoy international status than that they do so in matters of international law in general.

<sup>1</sup> For the distinction cf. *A.-G. for Canada v. A.-G. for Ontario* (1937), 53 T.L.R. 325; [1937] A.C. 326.

<sup>2</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 381, 382. The Imperial Conference of 1937 definitely adopted the view that this form had the advantage of making it absolutely clear that each member of the Commonwealth, party to a multilateral treaty, was in no way responsible for the obligations undertaken by any other member; Parl. Pap. Cmd. 5482, p. 27.

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It is, moreover, desirable to consider the precise position of the several Dominions in this regard, as there is no necessary identity of status of all the Dominions.

(1) The Dominions enjoy the right to receive and to accredit diplomatic representatives: The extent to which this right is used varies; Australia and New Zealand do not exercise it, but their right to do so is unquestioned, and their policy may change at any time. Australia<sup>1</sup> already appoints liaison officers with diplomatic status attached to British Embassies. The right is one which proves a definite international status, for it is not disputed that these envoys are in all matters of exclusive Dominion concern entitled solely to deal with them *vis-à-vis* the foreign State, and representations by foreign States in such matters must be addressed to the Dominion concerned. On the other hand, the Dominions by permission use the services of the British diplomatic and consular services in places where no Dominion representatives exist. In the same way, Dominion nationals can, when overseas, rely on the fact that they are also British nationals and claim assistance from British diplomatic agents and consuls on that score. The Irish Free State has legislated in 1935 to provide that for international purposes Free State citizens are to be treated as such only, but that legislation is not effective to bar recognition of their British nationality in cases where such exists.

(2) The power to make treaties is granted to all the Dominions, and the power is exercised directly and without British mediation of any kind in all those countries in which Dominion diplomatic representation exists. In other cases the British representatives are employed, and this is naturally the case as regards treaties affecting Australia and New Zealand which do not make use at present of the right

<sup>1</sup> *J P E.* xviii. 362 f. The first appointment was to Washington.

of legation. Representatives of these Dominions can, of course, be given special powers on occasion to enter into formal treaties, or they can conclude agreements with consular officers locally as governmental agreements, not made in the form of treaties in the name of the King.

There is no control over the making of treaties through the diplomatic representatives of the Dominions on the part of the British Government. It is true that the units of the Empire are bound by agreement, recognised by the Imperial Conferences of 1923, 1926, and 1930, to inform one another of proposed treaties, but, while there is no reason to doubt that this accord is kept, the right accorded is merely one of representation not of veto. The best example is the treaty between Germany and the Union of South Africa of 1928 which provided for the grant to Germany of any preferences in trade granted to Britain after the conclusion of the treaty. The British Government was duly informed of the accord, made representations on the ground that this clause was a breach of the inter-Imperial understanding that the units of the Empire should always reserve the right to treat other units differentially, a practice respected by the Irish Free State in all its treaties, but the Union persisted in its course. It may properly be held that the same position attains even when British diplomatic agencies are employed. The British Government, in that case, has, of course in its power the means of preventing action, but it could hardly do so unless on some matter where the proposed treaty was such as definitely to threaten vital British interests, and the question arose whether its conclusion was consonant with the maintenance of the connection between Britain and the other unit of the Empire. The obvious solution of any point of less importance would be to suggest that the matter be dealt with as a governmental accord, thus relieving the

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British Government of any possible responsibility for what was being done.

On the whole, therefore, the Dominions may properly be stated to have full rights of making treaties, and in that regard to be in the position of sovereign States. That they might make such treaties as would be inconsistent with their present relations to the rest of the Commonwealth is not essential in this connection.

It may, of course, be said that no foreign States are bound by international law to recognise the desire of a Dominion to exchange diplomatic representatives or to enter into treaty relations, but that is not a vital objection to admitting international status. It must be conceded that it rests with foreign powers to determine their attitude in this matter, but it is of great importance that the British Government is willing to facilitate the establishment of diplomatic relations and the making of separate treaties, and that the wishes of that Government have high authority in international affairs.

(3) Can, it may be asked, the Dominions exercise independently the right to make accords with foreign States, so that for example a Dominion may treat as existing *de jure* a Government not recognised by Britain, and refuse to treat *de jure* a State so recognised? No doubt it seems *prima facie* that divergence of view on such a point would be very awkward, and the issue might have arisen if the efforts of Mr. Cosgrave in 1937 had induced Mr. De Valera to recognise *de jure* the Government of the insurgent general in Spain. So far there has been no active divergence, mainly because the Dominions have adopted a policy of avoiding any distinctive action. In 1924 the Labour Government of the day, without consulting the Dominions, recognised *de jure* the Soviet Government of Russia; the procedure was

irregular, and the Prime Minister of the Commonwealth noted this fact when in August he stated that assurances had been given that there would be no repetition of such action.<sup>1</sup> Mr. Mackenzie King, on the other hand, held that it was necessary that Canada should accord recognition separately, which was duly done, and a trade delegation received. In 1927 when the British Government decided to break off relations with Russia in view of hostile propaganda carried out under the auspices of the mission and required its withdrawal, the Canadian Government followed suit and secured the withdrawal of the trade delegation. On the other hand, when relations with Russia were renewed on the return to power of the Labour Government in 1929, the Dominions refrained from action,<sup>2</sup> and equally remained indifferent to the suggestion made in 1934 when a provisional trade agreement was reached with Russia that further accords for the Dominions should be negotiated. In the case of the creation, on the other hand, of the Spanish Republic its recognition was accorded in 1931 by the British Government and all the Dominions, acting in concord.

In the rather heated discussions which took place in 1929–32 with the Vatican over the intervention of the clergy in political affairs in Malta, the withdrawal of the British Minister to the Vatican was very possibly withheld for the reason that the Irish Minister must of course have remained, and there would have been an undesirable divergence of action between the two Governments. Britain emphasised her disappointment at the refusal of the Pope to exercise his influence to secure better respect for law by the clergy by leaving the legation for a time in charge of a chargé d'affaires. How unsatisfactory had been the position in Malta was revealed convincingly during the period of ten-

<sup>1</sup> Cf. *J.P.E.* v. 78.

<sup>2</sup> Keith, *Journ. Comp. Leg.* xi. 98, 99.

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sion with Italy, which proved the existence of a considerable degree of disloyalty to the Crown on the part of the Italian elements of the Maltese people and of hostile efforts by an Italian consular officer, with the result that the constitution of 1921 had to be extinguished in 1936.<sup>1</sup>

It is clear that there are difficulties in the position, but it must be accepted that a recognition by the Government of the United Kingdom does not operate automatically for the Dominions, nor does of course a recognition by a Dominion operate for any other part of the Empire. Here again we have a very clear indication of international personality of a kind very different from that of a protected State of any kind.

(4) A more difficult point arises with regard to the position of the Dominions in relation to war. It has been claimed that the right to declare war of its own authority is an essential characteristic of a State of full international status, and that a territory which does not enjoy this right must be reckoned as in some measure a protected State. It may be admitted that this point is difficult. It has been argued that the power to declare war exists only on the authority of the Governments of the United Kingdom and all the Dominions acting together. But this doctrine cannot be deemed acceptable, and the British Government has by several international engagements absolutely precluded itself from adopting any such position. The British obligations towards France, Belgium, Iraq, and Egypt, all of recent date, are such as to compel in certain contingencies Britain to go to war, and the reduction *ad absurdum* of the theory is afforded by the case of Afghanistan, for it is always possible that difficulties with that State might necessitate resort to a declaration of war by Britain, such

<sup>1</sup> Keith, *Journ. Comp. Leg.* xiv 273-6, xviii 279.

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as took place in 1919. We must, therefore, accept the really undisputed fact that Britain as a State of international law in the fullest sense has an unquestioned right to declare war. Chapter II.

As regards the Dominions there is no reason to suppose that Canada, Australia, or New Zealand claim any such right, and it is idle to assign to Dominions rights which they would probably repudiate if any attempt were made to insist on their recognition that they possessed them. Nor has either the Union or the Irish Free State asserted the right. It is, of course, arguable that the acceptance by the Dominions of the treaty of 1928 for the Renunciation of War as an Instrument of National Policy implies that they possess the power to declare war, but that clearly goes too far. It is sufficient to justify their inclusion in the treaty that they might support Britain in a war or be implicated by Britain in a war. Further, the treaty unquestionably gives the Dominions the right to withhold aid from Britain if she undertook a war which was forbidden by the treaty. The Dominions are not bound to homologate a British interpretation of the treaty, and as noted above the Irish Free State expressly insisted that it did not accept the view that the defence of Iraq or Egypt fell within the true scope of self-defence which is allowed in the nature of things. Nor did Canada or the Union homologate it.

In the case of the Irish Free State, Article 49 of the constitution provides that, except in case of actual invasion, the Free State shall not be committed to active participation in war without the consent of the legislature. The Article rather clearly represents the contemporary view that a British declaration of war involved the Dominions in war, but that for active participation therein the assent of Parliament was needed, which was and has since been stated explicitly by successive Governments to be the Canadian

Chapter II. point of view. It is impossible, therefore, to deduce from it the existence of a distinct right to declare war, and in the legislation of 1936 no attempt was made to confer on the Executive Council explicitly or otherwise the power to declare war, though the control of appointments of diplomatic agents and consuls and of the making of international agreements was accorded. The issue was just mentioned in debate, but without eliciting any declaration from the ministry. The Constitution of Éire requires the assent of the Dáil for a declaration of war, but otherwise leaves the authority indefinite (Article 28 (3)).

The case of the Union of South Africa may be held to differ, because the whole external authority of the Union is vested in the Governor-General, and it could be used by the ministry, as indicated above, without even the concurrence of the King. Thus a declaration of war by the Union against e.g., Portugal or Germany, would seem at least not wholly excluded as a matter of law by the constitution. But it has never been asserted specifically by the Union Government, and it may be therefore that it would not insist that such a right was consistent with its membership of the British Commonwealth. In any case it may be admitted that in some measure full international status does not appertain to the most important of the Dominions.

(5) The same issue presents itself in the case of the right of a Dominion to remain neutral in a British war, which in the view of some jurists is a necessary sign of complete independence. Here it must be admitted that a real difficulty arises, and the views of the Dominions as to their rights are not accordant. Thus Canada, while constantly proclaiming the sole right to decide on active belligerency, has never yet claimed the right of neutrality, and a motion brought forward in the House of Commons on January 25,

1937, in favour of adopting an attitude towards the principle of neutrality similar to that of the United States and of applying it to any war was decisively rejected by an overwhelming majority. Even the spokesman of the French Canadians disclaimed any intention of disabling Canada from taking any action she might think fit in a British war,<sup>1</sup> while no stress was laid on the view that a British declaration of war did not affect the position of the Dominion. Neutrality also forms no part of the policy of Australia<sup>2</sup> or New Zealand,<sup>3</sup> and no claim has there been made that to be neutral accords with Dominion status.

In the Union of South Africa the position is necessarily very different, for the Union contains two provinces which had a long tradition of republican government, and at the Peace Conference of 1919 an appeal was addressed to the British Government to allow of the grant of their former status to these territories. As early as 1911 it was necessary for General Botha emphatically to deny the doctrine of the right of the Union to neutrality in a British war. On the other hand, the right of neutrality<sup>4</sup> is one of the tenets most firmly held by General Hertzog, whose views on this subject have not altered, though his desire to make use of the right may have suffered modification as the result of the success of the aggression of Italy on Ethiopia and the disappearance of the dream of security through membership of the League of Nations. General Hertzog, however, has displayed at various times a considerable amount of ignorance as to the implications of neutrality, including the fact that under it the British navy would have to be denied the right to fix its headquarters in ports of the Union. When finally induced to

<sup>1</sup> *J.P.E.*, 1937, pp. 302-9.

<sup>2</sup> See Mr. Menzies, A.-G., Oct. 9, 1935 (*J.P.E.*, 1936, p. 64).

<sup>3</sup> Cf *J.P.E.*, 1936, pp. 98 ff.

<sup>4</sup> See *J.P.E.*, 1935, pp. 390 ff.

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explain his views on this head, the result is clearly not impressive. The issue was brought to definition by discussion of the question of Simonstown. That port is the headquarters of the South African division of the British navy, and, when in 1921 it was decided to withdraw all the British military forces from the Union, the question of its land defence necessarily had to be settled. It was agreed by the Union Government that, in consideration *inter alia* of the very valuable properties handed over for purposes of defence by the British Government, the Union would accept responsibility for the land defence of the naval base. That agreement obviously presented a very difficult point for those who argued in favour of the right of neutrality, and the first argument of General Hertzog, which contended that Simonstown was to the Union as Gibraltar was to Spain, was manifestly unhappy,<sup>1</sup> suggesting as it did that Simonstown was no part of the territory of the Union, a most unpalatable doctrine to any South African. His later defence was based on the remarkable theory that neutrality was not contravened by the grant of military assistance to a belligerent, provided always that the amount granted was in substantial accord with an agreement existing before the war in question.<sup>2</sup> This remarkable doctrine was supported by the fact that in 1788 Sweden had occasion to criticise Denmark for affording aid to her enemy Russia in accordance with a treaty of 1781. The facts are rather obscure, and it is asserted by no less an authority than Fauchille that the issue was ultimately solved by Russia renouncing her right to claim Danish aid. The second instance cited by General Hertzog's adviser is the claim of Canning in 1826 that aid

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 350, 351.

<sup>2</sup> Keith, *Letters on Current Imperial and International Problems, 1935-1936*, pp. 63, 64.

could be given to Portugal without breach of neutrality towards Spain because of the old treaty engagements between Britain and Portugal. It is really difficult to take seriously these musty relics of a departed age. Modern ideas of neutrality utterly repudiate any such action as these instances support, and the grant of aid to Simonstown would deprive the Union of any right of respect for her neutrality, even if she declared it. The matter has become of first-class importance because after some hesitation and doubt as to the continued operation of the agreement as to Simonstown the Ethiopian *débâcle* elicited from Mr. Pirow on April 2, 1937, a categorical and emphatic homologation of the agreement.

Though, however, that point must be deemed to dispose of the possibility of the Union claiming as of right to have her neutrality recognised by an enemy of Britain in a British war, there remains the question whether the Union could declare neutrality. It is to be noted that the means now exist for acting without the concurrence of the King. Under the Royal Executive Functions and Seals Act, 1934, there is machinery for proclaiming neutrality, and to do so would unquestionably meet the views not merely of the Nationalist party in the Union, but of many of the followers of the Government who formerly were Nationalists, and whose views have not materially altered because of the coalition or fusion of parties on which the present administration rests. Further, the right is supported by the parallel of Hanover, which could be neutral in a British war<sup>1</sup> and could be at war while Britain was a neutral as in 1715 when Hanover and Sweden were at war, and Britain was neutral.<sup>2</sup> More distant is the case of the Ionian Islands, which cer-

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<sup>1</sup> Cobbett, *Weekly Register*, 1803, iii. 859.

<sup>2</sup> Chance, *George I. and the Northern War*, p. 101.

Chapter II. tainly could be neutral in a British war.<sup>1</sup> But the difficulty in accepting as cogent these parallels is that there is a tie of common allegiance between British subjects in the United Kingdom and British subjects, whether Union nationals or not, in the Union. It is impossible to argue that there is a real parallel in the case of Hanover, for, though there is authority to the effect that during the union of the Crowns Hanoverian subjects were British subjects in the eyes of British law,<sup>2</sup> there is no authority that Hanover regarded British subjects as Hanoverian subjects. Further, the parallel is not complete, for the Crowns of the United Kingdom and the Union of South Africa are not obviously divisible as were those of Hanover and the United Kingdom, which notoriously were held on a tenure which would sever them the moment that a female ascended the British throne. So far the union between Britain and a Dominion has been and must still be regarded as a permanent union. On the whole, therefore, the argument for the right of neutrality is not very strong. The case of the Ionian Islands is not effectively in point, for no one ever suggested that the islanders were British subjects.

It must further be remembered that at common law, which is in matters affecting the sovereign authority the law of the Commonwealth where not restricted by legislation, the declaration of war by the King creates a relation of enmity between all persons in his dominions and all persons in enemy countries. It is hard to feel in face of that fact that a declaration of neutrality would be possible. It would, of course, be open to any Dominion to abolish the effect of a British declaration by legislation, but that has not yet been

<sup>1</sup> *The Ionian Ships* (1856), Spinks, 212.

<sup>2</sup> Dicey and Keith, *Conflict of Laws* 1932), p. 144, *Isaacson v. Durant* (1886), 17 Q.B.D. 54

done in the Union, and the question under consideration is simply the present effect of a declaration of war and the consistency therewith of a Union declaration of neutrality not resting on Statute.

The whole issue, in one sense, is unimportant, because a declaration of neutrality would really mean a determination to secede from the Commonwealth, and it would be determined by political, not legal, reasons. But it must be remembered that political action always seeks legal reasons to support it. The Declaration of Independence is filled with a recital of the illegalities perpetrated by the Crown which proved that it had violated its fundamental obligations to the colonies, and had thus destroyed the bond uniting them. Hence it is natural that General Herzog, who at one time unquestionably desired to use the right of secession, should remain insistent on the legal right of neutrality, and should adduce legal arguments in its support, which, therefore, cannot be passed over, especially not as they are seriously meant and are entitled to respectful consideration.

In the case of the Irish Free State the obligation to provide certain specified harbour facilities in peace, and in time of war or strained relations with a foreign power such other harbour or other facilities as the British Government may require for the purpose of coastal defence, clearly disentitles the Free State, as Mr. De Valera has often insisted, from being able to claim respect for her neutrality in a British war. It is noteworthy that Mr. De Valera's jurists have not suggested the possibility of accepting the doctrine adopted by General Herzog. He has instead offered a pledge that the Free State would never allow use of its territory or waters for hostile action against Britain, and the

<sup>1</sup> E.g. Keith, *Speeches and Documents on the British Dominions, 1918-1931*, p. 463.

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good faith of this offer is not questioned. But plainly it would be of considerably less value than the present position. The abstract right to proclaim neutrality is not dealt with in the legislation of 1936,<sup>1</sup> and in view of the acceptance by Mr. De Valera of its problematical value, that is not surprising. In the Free State, however, it must be remembered, as opposed to the Union, the common bond of British nationality has, as far as possible to the Free State, been eradicated by Free State legislation. But, as will be seen, it is dubious if the attempt made, though energetic, is wholly successful.

The position, therefore, is that the right to declare neutrality in a British war is not claimed by the three greater Dominions, and in regard to the other two is disputed, while legally no foreign power would be under any obligation to respect such a declaration by either the Free State or the Union, since either is bound to render Britain in war services incompatible with neutrality. In practice, no doubt, a foreign power might recognise neutrality on a promise that the obligations to Britain would not be kept, but that plainly would mean a revolt by the Dominion, and of the right of a Dominion to revolt nothing need be said on legal grounds.

The conclusion which may be arrived at from these facts and theories is that in a large sense the Dominions are really and unquestionably States of international law, and that not merely, as was probably once the case, within the limits of the activities of the League of Nations and while acting as members of the League. That they possess the full plenitude of international status enjoyed, for instance, by France or Germany need not be asserted, nor is it necessary

<sup>1</sup> The Constitution of Eire is equally vague, though it gives all external power to the Government, Arts. 28 (2), 29 (4).

for practical purposes that they should seek to claim it.

A question naturally arises: Is there an international unit consisting of the whole of the Empire, the United Kingdom, the Dominions, the colonies, protectorates, mandated territories, India, and Burma? It does not appear that it is worth while contending for its existence. All that seems necessary is to admit that there is one unit with complete international authority, and four Dominions with international status though not in such a plenary manner, while India is an aspirant to such a result, and in a much more distant future Burma may make a like claim to recognition.

A further and difficult issue is whether, in the event of a dispute with some foreign power in which a Dominion failed to satisfy that power, there would be a right in that power to apply to the United Kingdom or the rest of the Dominions for aid in securing redress? The answer would seem to be that good offices in securing an accord might properly be tendered without overstepping the rights of units in their relations *inter se*, but that the matter could hardly be put higher than that. The question may become of more importance with the discredit cast upon the League of Nations by its failure in the vital issue of Ethiopia and its inevitable impotence to intervene for good in the affairs of Spain. But the view here taken is that the position of a Dominion is much higher than that of a protected State, and there can be no possibility of applying the principle applicable to their case that a power which receives no redress from such a State may apply to a higher forum, the protecting State. The obligation of securing the observance of international law within its borders is one incumbent on each Dominion in its own right, and it must take the consequences of any infraction. To put it concretely, for Britain to intervene or to be appealed to in the contentions between the Union of

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South Africa and Germany over the treatment meted out by the administration in South-West Africa under the control of the Union to German subjects would be contrary to the present structure of the Empire. On the other hand, there remains the clear obligation of all the units to render aid to one another against external aggression, though such aid need not be automatic or afforded without conditions. Assistance could properly be refused unless the unit in question consented to allow the issue in dispute to be referred to arbitration and to undertake to give effect to an arbitral award. Such a possibility cannot be ignored in a theoretical discussion, but it may legitimately be hoped that a concrete instance will not arise. But it cannot be denied that a difficult position would be created if in certain circumstances Britain should find it advisable to meet German claims for restoration of territory in Africa, and Germany should desire to put pressure on the Union to make a like concession. For Britain to risk a conflict with Germany over an issue on which concession to Germany seemed desirable or even morally incumbent, and on which the Union held a different view, would obviously raise a very serious situation for the Empire, and it is easy to understand that consideration for the position of Union has counted largely in the refusal of Britain to seek to meet the not unnatural desires of Germany on this head. But whether Germany can or should be denied the possibility of overseas expansion is a question not to be decided merely on the simple slogan, "What we hold we keep".<sup>1</sup>

The view here taken is supported by the finding of the Imperial Conference of 1937 as regards the participation of members of the Commonwealth in multilateral treaties.<sup>2</sup> It

<sup>1</sup> Keith, *Letters on Current Imperial and International Problems, 1935-1936*, pp. 205-15.

<sup>2</sup> Parl. Pap Cmd 5482, p 27

was recognised that each member does so as an individual entity and is in no way responsible for the obligations undertaken by any other member, unless there is express provision to the contrary in the treaty. That saving, of course, covers the case where, as in the London Naval Limitation Treaty of 1930, now obsolete, a quantitative limitation of naval tonnage was prescribed for the whole of the Commonwealth, for plainly all the members would have been bound to bring pressure on the others to avoid any overstepping of the limits laid down.

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## CHAPTER III

### THE DOMINIONS AND THE UNITED KINGDOM: INTERNAL SOVEREIGNTY AND THE STATUTE OF WESTMINSTER

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THE relations of the Dominions and the United Kingdom in internal affairs now rest on the sure foundation of the Statute of Westminster, 1931, which marks the culmination of elaborate efforts to achieve accord. The Imperial War Conference of 1917, recognising that *inter arma silent leges*, left constitutional revision for a special Conference to meet after the war, but in 1921 in the absence of the driving force of Sir Robert Borden the negative opinion of Mr. Hughes, Prime Minister of the Commonwealth, who believed that the Dominions had won all they desired and had no more worlds to conquer, prevailed over the dissent of General Smuts, and revision was postponed indefinitely. The circumstances which revived the movement were complex. The Irish Free State had obtained Dominion status under an instrument<sup>1</sup> which it regarded as an international treaty made between warring powers, though in British eyes it was rather, like the peace of Vereeniging which concluded the resistance of the Boers in the field in South Africa in 1902, no more than terms made with insurgents whom it was desired to convert into loyal subjects. Naturally in view of its origin the State was anxious to secure the

<sup>1</sup> See Rynne, *Die völkerrechtliche Stellung Irlands*, pp. 44 ff. Contrast H. Walter, *Die Stellung der Dominien im Verfassungssystem des Britischen Reiches*, pp. 16-18. See also Harrison, *Ireland and the British Empire*, 1937, pp. 78 ff.

definition of the status of Canada which had been assured to it as the price of peace, and it in 1924 used its new status as member of the League to assert that relations with the United Kingdom were governed by international law, a view energetically combated by the British Government.<sup>1</sup> Canada, whose voice was of paramount importance, had been roused to action by the controversy over the Treaty of Lausanne already touched on, and in internal relations by the constitutional crisis of 1926 when the Governor-General exercised his discretion to refuse to grant a dissolution to Mr. Mackenzie King,<sup>2</sup> and by the shock to the Canadian sense of autonomy involved in the decision of the Privy Council that Dominion legislation to abolish the appeal to the Privy Council in criminal causes was invalid.<sup>3</sup>

To these voices was added that of the Union of South Africa. General Smuts had asserted the sovereign independence of the Union while admitting that it was not fully expressed<sup>4</sup> in the current legal forms, and his opinion in favour of drastic change was naturally fully shared by General Hertzog, who had vainly pleaded in 1919 for the grant of independence to the Transvaal and the Orange Free State as in accordance with President Wilson's principles of the Peace Settlement.<sup>5</sup> General Hertzog was determined to wring from Britain an admission of sovereign independence, which inevitably might later form the basis

<sup>1</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 347, 348. <sup>2</sup> *Ibid.* pp. 149-60.

<sup>3</sup> *Nadan v. R.*, [1926] A.C. 482; Keith, *Responsible Government in the Dominions*, ii. 1087 f. It is true that the Privy Council refused leave to appeal in that case, but the fact that it had to point out that the Dominion legislation was *ultra vires* caused very strong feeling in Canada.

<sup>4</sup> A statement of the legal position was given in Keith, *Imperial Unity* (1918), where many changes were recommended; but effect was delayed until 1931, when more radical alterations were adopted. Gradual reform seems always difficult.

<sup>5</sup> Keith, *War Government of the British Dominions*, pp. 230-33.

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III. of the assertion of independence, but which at least would give the feeling of freedom within the Empire. The convergence of these different motives was decisive, for Australia and New Zealand lacked sufficient conviction of the danger of the situation to protest effectively against the decisions arrived at. The Conference therefore accepted from a Committee on inter-Imperial relations a formula, due it is believed to the ingenuity of Lord Balfour, which defines the relations of Great Britain (more accurately the United Kingdom) and the Dominions as follows: "They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations". This assertion plainly was proleptic in that the forms of legal action were far from agreeing with its assertions, but it was intended that these matters should be investigated by experts. At the same time, in Lord Balfour's view, equal importance attached to a further statement: "The principles of equality and similarity appropriate to status do not universally extend to function", and questions of diplomacy and defence in special required flexible machinery which could from time to time be adapted to the changing circumstances of the world.

The latter declaration proved to have little importance in practice. The Conference of experts tardily met in 1929 and ignored in its report all the limitations suggested by the Conference of 1926, determining instead to establish absolute equality and similarity of function. The report was received with some discomfort in Australia, New Zealand, and even Canada, but, though these doubts were voiced at the Imperial Conference of 1930, the doubters, as was

natural, were overridden by their assured colleagues. It is interesting, though not of fundamental importance, to note that the composition of the Conference of 1930 gave special importance to Labour views and those of the non-English elements of the peoples of the Empire. The essential English virtue of compromise was hardly discernible in the result.

It was agreed that effect should be given to the agreement by a Statute to be passed after approval of its terms by all the Dominion Parliaments. This was duly done, and the Statute of Westminster became law on December 11, 1931.<sup>1</sup>

The Statute is not a revolutionary measure. It represents the outcome of a long process of development under which the Dominions had achieved almost full autonomy as regards internal affairs, and its importance lies mainly in the fact that it establishes as law what had before rested on convention. The system of responsible government in the colonies rested essentially on a division in exercise of the authority of the Crown.<sup>2</sup> The executive, legislative, and judicial functions of the Crown were exercised in part on the advice and authority of colonial ministries, legislatures, and judges, in part on the authority of the Imperial Government, the Imperial Parliament, and the Judicial Committee of the Privy Council. The whole system of the evolution of responsible government lay in the transfer of effective authority from the latter to the former instrumentalities. The vital step in the creation of responsible government was the decision of the British Government to transfer executive authority from the Governor, chosen by it and irresponsible to the colonial legislature, to ministers, who should on the

<sup>1</sup> Extracts from the Conference Proceedings and the debates on the Statute are given in Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 232-307.

<sup>2</sup> Keith, *Responsible Government in the Dominions* (1928), I. chap. i.

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British system represent the will of the majority of the lower house of the legislature. As a logical consequence, the control over the passing of colonial legislation, hitherto freely exercised by disallowance of colonial Acts, or refusal to assent to reserved Bills of colonial legislatures, was relaxed in all matters not of vital Imperial concern. Contemporaneously the appointment of judges was left in the hands of colonial ministries, and their removal made subject to the resolutions of colonial legislatures. The British Government thus ceased to have any control over judicial appointments, but supervision of judicial decisions was still preserved through the medium of the appeal permitted to the Judicial Committee of the Privy Council. No effort was made to limit by law the measure of the Governor's obligation to accept ministerial advice. Australian proposals in 1853-5 to limit the matters in which colonial legislation might be disallowed by the Crown were negatived, and the whole procedure was governed by a flexible practice which, with the passage of years, essentially freed the colonies from external control. In the same way the exercise of the supreme powers of the Imperial Parliament was restricted by practice to cases where legislation was desired by the colonies.

This conventional limitation of Imperial control nevertheless left in being a mass of legal restrictions which might be deemed to fetter the Dominions. To claimants of national sovereignty like Mr. Cosgrave, General Herzog, or Mr. Mackenzie King these restrictions presented an inconvenient anomaly, and it was the work of the Conferences from 1926 to 1930 and the Statute of Westminster to abolish them, so that the internal sovereignty of the Dominions might stand out unquestioned. The issues affected were complex, and even yet the establishment of complete sovereignty in the

sense of independence of Imperial intervention is not wholly complete. But the essential elements of such sovereignty have been attained.

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(1) The position of the Governor-General of the Dominions served originally as the essential means of control of the local executive by the Crown. When responsible government was accorded, his functions assumed a clear dualism. In the main he acted as the constitutional head of the Government advised by ministers as is the Crown in the United Kingdom. But he had also to play the part of intermediary between the local and the Imperial authorities, and he owed his appointment to the Imperial Government by whose advice he could be removed from office. The combination of functions had and has supporters in the Dominions, but the Conference of 1926, no doubt moved in part by the constitutional dispute in Canada in that year between Lord Byng and Mr. Mackenzie King over the issue of the grant of a dissolution, adopted a resolution which declared that the position of the Governor-General towards the administration was analogous to that of the King towards the Government of the United Kingdom, and as a corollary it was compelled to recognise that it was inconsistent to combine this constitutional function with the duties of a representative of the British Government, in any case at least where the Dominion Government objected to such a combination of functions. This was followed by the restriction of the Governor-General of the Union of South Africa, the Irish Free State, and Canada to local functions only, but the appointment of the Governor-General to represent the King still remained under the control of the British Government, though the practice had long prevailed to consult the Dominion concerned before any appointment, and the first Governor-General of the Irish

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Free State had been virtually selected by the Irish Government. The Conference of 1930, however, reviewed this issue, and arrived at the conclusion that the appointment was a matter between the King and the Dominion Government, which might or might not use the British Government as a channel of communication with the King in regard to the matter. The decision was followed by the appointment by the King on the formal advice of the Prime Minister of the Commonwealth of Sir Isaac Isaacs, the Chief Justice, to be Governor-General.<sup>1</sup> The appointment was admittedly not advised by the British Government nor was it wholly approved in Australia where the opposition expressed dissent. The issue of the legality of any appointment made otherwise than on the advice of the Imperial Government was sharply contested in the Commonwealth,<sup>2</sup> but doubtless without sufficient ground. The constitution does not require specifically that a British minister should recommend the appointment, and the King clearly can act on the advice of an Australian minister if he thinks fit. There arose, indeed, a technical difficulty in the fact that under the prerogative letters patent creating the office of Governor-General the appointment was required to be made under the signet, and this was controlled by a Secretary of State. The necessity of using this form rendered the co-operation of the Secretary of State for Dominion Affairs necessary, but his accord was really formal, and there is no legal difficulty in amending the letters patent to abolish the use of the signet and the formal intervention of any British minister. In effect, therefore, the Governor-General is the free choice of the Dominion Government, subject only to the concurrence of the King, who on

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 103-6.

<sup>2</sup> Mr. Latham, Dec. 5, 1930, in House of Representatives. But see Keith, *Journ. Comp. Leg.* xiii. 259, 260.

the principles of ministerial responsibility is bound to accept the advice of the ministry if persisted in. In this way the selection of Lord Bessborough as the Governor-General of Canada on February 9, 1931, and of the popular novelist, Mr. John Buchan, as his successor in 1936, was made on the sole responsibility of the Dominion Government.

It follows inevitably that the power of securing the removal of a Governor-General before the expiry of the normal term of office, five years, rests with the Dominion Government, a fact of course which differentiates his position vitally from that of the King in the United Kingdom, and is in some measure inconsistent with the parallel drawn between the offices by the Conference of 1926. The right, however, of the ministry to advise removal and the practical necessity of the King to act on such advice were asserted in July 1932 by the Governor-General of the Irish Free State when protesting against the studied courtesy shown to him as the King's representative by the ministry of the Free State. His Majesty in fact felt bound to yield to the demand of the ministry for his relinquishment of office.<sup>1</sup> The position is of the highest importance, for it reveals the fact that the Dominions enjoy now virtually unfettered freedom in selecting and removing the head of the executive, subject only to such moderating influence as might be exercised by the King, by whom appointment and removal must formally be approved. In neither case need the Imperial Government now be consulted, nor need it be accorded any right to intervene.

(2) The change in the position of the Governor-General resolved on by the Conference of 1926 raised immediately the issue of the exercise of the power vested formally in him regarding the reservation of Bills for the signification of the

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 129, 144, 159.

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royal pleasure. The right to reserve Bills was obviously a valuable instrument in the control of Dominion legislation. The Governor-General had no doubt the power to refuse assent, but such refusal was obviously a drastic measure which would be gravely resented, and would render relations between the ministry and the Governor-General difficult. By reserving a Bill, on the other hand, the decision as to final assent was left to the Crown on the advice of the British Government. In practice that Government, if it had good reason to suggest objections to a Bill, would ask that these alterations should be made, and agreement would be reached before assent was given. The control exercised, therefore, had been reduced from a dictatorial attitude to one of representations, but the existence of the power was obviously a restriction on Dominion sovereignty, and as such it was examined by the Imperial Conference of 1926. Its opinion was guarded; it enunciated the doctrine that it was the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs, and that consequently it would not be in accordance with constitutional practice for advice to be tendered to the Crown by the British Government in any matter appertaining to the affairs of a Dominion against the view of the Dominion Government. But this view was not made applicable to provisions embodied in constitutions or in specific Statutes expressly providing for reservation. The omission is significant; the Conference was not prepared to assert that the British Government was not entitled to advise on its own responsibility on such vital matters as constitutional changes or Merchant Shipping Bills.

The Conference of 1929 took a further step towards Dominion sovereignty. It recognised that it was not proper for the Crown to issue any instructions to the Governor-

General as to reservation of Bills, which, therefore, he must reserve, if at all, only on ministerial advice or on some other constitutional ground. It held further that, if a Bill were reserved in this way, the decision as to its fate must be in accordance with the views of the Dominion Government, not of the British Government. Even as regards Bills reserved under constitutional or other statutory provisions the rule of the wishes of the Dominion Government should prevail, though this view was qualified by the use of the words "in general". The Conference of 1930 accepted the recommendations of 1929, and the doctrine that the British Government should not exercise its judgment as to reserved Bills, if any, is definitely established.

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On the legal side of the question the position is not yet quite satisfactory. Assent to a reserved Bill must be expressed by Order in Council, and an Order in Council is still passed only on the formal request of a minister of the Crown in the United Kingdom. The omission of reservation from all constitutions and Statutes is therefore desirable, and, as the Conference of 1929 pointed out, can be effected by local or Imperial legislation. The latter<sup>1</sup> has already been invoked to render needless reservation under the Merchant Shipping Act, 1894, and the Colonial Courts of Admiralty Act, 1890. But the Statute of Westminster by its express terms is not operative within Australia,<sup>2</sup> New Zealand, or Newfoundland, whose constitution has been in abeyance since 1934, unless brought into operation by Act of the Parliament of the Dominion. These measures, therefore, still apply to those Dominions, and for instance the Navigation Act, 1935, of the Commonwealth only became law after reservation and

<sup>1</sup> Statute of Westminster, 1931, ss. 5, 6.

<sup>2</sup> Legislation to adopt the Act has been promised in the Governor-General's speech, June 1937.

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Other cases of reservation under constitutional provisions have been removed by the authority of the Parliament. Thus the Irish Free State in 1933<sup>1</sup> removed from the constitution the power to reserve, and the Union of South Africa adopted the same course of action in the Status of the Union Act, 1934. The step taken by the Union was rather striking, because under Section 64 of the South Africa Act, 1909, it was expressly provided that any Bill altering the provisions of the Act dealing with the House of Assembly must be reserved, and that provision was intended to safeguard and secure Imperial control over any measure dealing with the Cape native franchise; moreover, in the Royal Instructions to the Governor-General reservation in such a case was emphasised and stress was laid on this precaution when the Bill was commended to the acceptance of the British Parliament. Under the changed position, however, no objection was raised to the Bill removing reservation. A further safeguard disappeared at the same time, as Bills abolishing the provincial councils or abridging their powers fell to be reserved. The provinces were consigned by the passing of an Act, No. 45 of 1934, under which Parliament was not to abolish any provincial council or abridge their powers except on petition to Parliament of the council affected. The same rule was laid down for alteration of provincial boundaries, the division of a province, or the formation of a new province. It was at the same time stated by Mr. Pirow that the juridical value of the provision was not great, since the Act could be repealed by a simple majority, but he admitted its moral value.

In New Zealand the Constitution of 1852 requires that

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 139 ff.

any Bill to alter the Governor-General's salary or the small sum secured therein for native affairs shall be reserved. In the Commonwealth<sup>1</sup> and the Union of South Africa<sup>2</sup> the Parliaments are authorised to limit the appeal to the King in Council from the High Court and the Appellate Division of the Supreme Court respectively, but any Bill for this purpose must be reserved. The Union has spared this one case of reservation, which in the Commonwealth could be removed only by the formidable process of constitutional change. On the other hand, under the new system reservation would be a mere form, and assent would be given if pressed for by the Commonwealth Government.

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(3) While reservation of Bills was in 1926 still an integral part of the machinery of Imperial control, disallowance, though provided for in every constitution, except that of the Irish Free State in 1922, was virtually obsolete. No Canadian Act had been disallowed since 1873 and then virtually on Sir John Macdonald's suggestion; no New Zealand Act since 1867 when the British Government and the Colonial Government were in disagreement regarding the native question, and no Commonwealth or Union of South Africa Act had ever been disallowed. But the deletion from the constitutions of provisions for disallowance encountered one difficulty, which has resulted in no change being yet made, save in the Union of South Africa. Under the Colonial Stock Act, 1900, provision is made for the making of regulations by the Treasury regarding the terms on which colonial securities may be admitted to trustee rank, and thus be given a considerably enhanced value in the British market. One of the conditions imposed by the Treasury, in addition to the requirement that funds should be held in England available to meet any decree of a British

<sup>1</sup> Const. s. 74.

<sup>2</sup> South Africa Act, 1909, s. 106.

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Court, is that any Dominion Government desiring a new issue to be given this status, must place on record a formal expression of its opinion that any Dominion legislation which appeared to the British Government to alter any of the provisions affecting the stock to the injury of the stockholder, or to involve a departure from the original contract in regard to the stock, would properly be disallowed.<sup>1</sup> The existence of this provision has had the effect of preventing trustee rank being accorded to Canadian provincial loans, a result not to be regretted in view of the vagaries of the legislation of Alberta in 1936-7. The Union of South Africa appreciated to the full the desirability of keeping faith, in respect of all stock issued on this understanding, as laid down by the Conference of 1930, and affirmed for Canada by the Prime Minister in the House of Commons on June 30, 1931. But it desired to remove the anomaly of disallowance, and an ingenious solution was found. The Imperial Parliament passed the Colonial<sup>2</sup> Stock Act, 1934, under which in lieu of this requirement which is given statutory validity there may be adopted an alternative course. The Dominion Government may undertake, with the confirmation of Parliament, that any legislation which appears to the British Government to offend in either of the ways above mentioned shall not be assented to until the agreement of the British Government had been secured, while, if such legislation is passed and exception taken to it by the British Government it will be amended as requested by the British Government. It cannot be said that this new arrangement, though formally adopted by the Union Parliament so as to permit of the abolition outright of disallowance, is wholly

<sup>1</sup> See Act No. 6 of 1913 of Union of South Africa. Canada has resumed such borrowing.

<sup>2</sup> The use of this term is interesting but unavoidable. See the Colonial Stock Act, 1900, Declaration Act, 1934, of the Union.

happy. It would be very difficult for the Union ministry to obtain changes in an Act once made, for a British request would be resented by the House as implying bad faith. Far more to the point would have been a simple agreement to submit to an inter-Imperial tribunal any complaint by stockholders deemed worthy of such treatment by the British Government on the understanding that the Union would honour promptly any award.<sup>1</sup> It may be noted that such an arrangement would have the advantage of removing any suggestion that the British Government was acting in a discourteous manner, for all that it would be required to do would be to say that it thought that there was sufficient ground to justify the matter being dealt with judicially. Happily the value of the British market for Dominion securities is such that default is unlikely. When for a brief moment in the struggle between New South Wales and the Commonwealth in 1932, the latter, in order to emphasise the responsibility of the State, delayed to provide funds to meet claims falling due, the British Government pointed out at once the risk of grave injury to Australian credit, which it might not be easy to undo, and payment was promptly made.

(4) With none of the issues dealt with above, save certain specific cases of reservation already noted, did the Statute of Westminster deal. But it ended a long-contested issue by declaring that the Parliament of a Dominion has full power to make laws having extra-territorial operation. The section has only at present operation in Canada, the Union, and the Irish Free State, for like the other clauses of the Statute it has not been brought into operation in the Commonwealth, where action is pending (1937), New Zealand, or Newfoundland, so that in the Whaling Industry (Regulation) Act,

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 170-73.

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1934, it was necessary by Section 15 to give extra-territorial validity to any legislation of Australia or New Zealand<sup>1</sup> regarding shipping therein registered, while Newfoundland registered shipping is covered by the Act itself. It must be noted that the territorial limit was not admitted to exist by the Union or the Free State, and that it had been doubted in Canada. But in addition to this provision in the Statute a wider interpretation of Dominion powers may be found in the decision of the Privy Council in *Croft v. Dunphy*,<sup>2</sup> where the principle was laid down that, in interpreting any Dominion legislation, it must be assumed that the power to legislate includes extra-territorial operation if that is necessary to make it possible effectively to exercise the power. This decision rather lessens, but it does not remove, the importance of the Statute of Westminster, as the whaling legislation above mentioned indicates, though it would seem to be perfectly proper to hold that the power to regulate registered shipping already possessed by the Dominions under Section 735 of the Merchant Shipping Act, 1894, would cover any legislation regarding the whale fisheries. The exact sphere of authority now open under the Act and the decision to the several Dominions is far from being clear and will be discussed below.<sup>3</sup> But the fact that the Dominions are no longer in a definitely inferior position in point of sovereignty is to be noted.

(5) Of far greater importance than Section 3 of the Act is Section 2, which definitely touched on the vital issue of Imperial supremacy. It provides, first, that "the Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act (*i.e.* December 11, 1931)

<sup>1</sup> Whaling Industry Act, 1935 (No. 12); see Sir F. Bell, *J P E.*, 1936, p. 107  
A new Whaling convention was arrived at, June 1937; Cmd. 5487.

<sup>2</sup> [1933] A.C. 156.

<sup>3</sup> Chapter X (2).

by the Parliament of a Dominion". This enactment is repeated and emphasised by the further provision that "no law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule, or regulation in so far as the same is part of the law of the Dominion".

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The enactment unquestionably extends widely the sphere of operation of Dominion legislative power, so far as theory is concerned. The Colonial Laws Validity Act, 1865, was itself a noteworthy extension of colonial legislative authority. It was passed to make clear the exact force of the vague rule imposed from the beginning of colonial legislation on legislatures that their legislation was to be in accord with the principles of English law. Difficulties in the application of this doctrine were raised by the perverse decisions of Mr. Justice Boothby<sup>1</sup> of South Australia, and finally it was decided by the British Government to solve the problem by making it clear that repugnance of colonial legislation was to be confined to repugnance to statutory enactments, including orders, rules, and regulations made under such measures, which were explicitly or by necessary intendment applicable to the colonies. Colonial legislatures were thus rendered free to enact measures which contravened the principles of the common law of England or of statutory law when such statutory law had merely been introduced into the colony.

<sup>1</sup> Keith. *Responsible Government in the Dominions* (1912), I. 400-408, m. 1243-5.

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III. for it was the accepted doctrine that on the settlement of a colony English law, including statutes of general application, became the law of the colony. The legislation with which colonial legislatures could not freely deal was thus limited to measures expressly enacted for the colonies, including such Acts as those providing for the treatment of fugitive offenders, for extradition, for foreign enlistment, and other international issues, including prize jurisdiction and admiralty jurisdiction. There were obviously strong reasons for removing such questions from colonial competence. They dealt with matters in which the Imperial Government had necessarily a controlling influence, and the use of Imperial legislation was imperative for uniformity and effectiveness. But clearly with the development of Dominion status the restriction had become out of place and the maintenance of subordination illogical. But a mere repeal of the Colonial Laws Validity Act was out of the question. Not merely was the Act still to remain in force except as regards the six Dominions,<sup>1</sup> Canada, Australia, New Zealand, South Africa, the Irish Free State, and Newfoundland, but the mere repeal of the Act would almost inevitably have revived the doctrine that legislation must not contravene the common law. It was necessary, therefore, to make the position absolutely clear and also to remove a possible misunderstanding that might arise. It was pointed out by the British Government that, while British Acts were no longer to bind the Dominions as part of Dominion law, the British Parliament must still retain the right to legislate in respect of matters taking place in the Dominions and affecting British subjects when present therein to the same extent as

<sup>1</sup> The provinces in Canada, but not the States in Australia, are given the benefit of the section.

it could legislate regarding events taking place in foreign countries, and effect was given to this principle by the addition of the final words of the clause. The essential difference between the old system and the new lies in the fact that such British legislation as is contemplated as still possible would be enforceable only in British Courts, and not as under the old system in the courts of the Dominions.

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It will be noted that the rule laid down applies only to any Act existing when the Statute was passed or enacted in future; it does not apply to the Statute itself, which cannot be varied by Dominion legislation, since this would destroy the safeguards for the Canadian and Australian constitutions. It was partly to meet the objections felt by the Australian Government to this position that Sections 2-6 of the Act were made subject to adoption by the Commonwealth, New Zealand, and Newfoundland, but they apply absolutely to the other Dominions. As, however, they confer privileges, that fact cannot be said to be a derogation from Dominion sovereignty, though unquestionably that is better preserved by the procedure adopted in the case of the Commonwealth. This was later admitted by the Union, which therefore by the Status of the Union Act, 1934, enacted the relevant part of the Statute as a Union Act.

(6) The removal of the rule of repugnancy and of any territorial limitation serves one purpose of great importance from a practical point of view. Prior to the enactment the position of British merchant shipping was regulated essentially by Imperial legislation, the Merchant Shipping Act, 1894, and its important amending Act of 1906. Under this system the legislative power of the Dominions was normally exercised only in respect of shipping therein registered and their coasting trade, while other shipping, British and foreign, was regulated by Imperial measures. The reasons of

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convenience which supported this plan of action were cogent, so cogent that the Colonial Merchant Shipping Conference of 1907 approved the principle as in itself desirable. But it was strongly felt in the Dominions that this restriction was a derogation from sovereignty; shortly before the Conference of 1926 a decision of the High Court of the Commonwealth<sup>1</sup> emphasised the inability of the Commonwealth to impose its legislation on ships registered in New Zealand and trading in Commonwealth ports. The issue was dealt with by the Conference of 1929, and it was decided that full freedom of legislation must be accorded to the Dominions, the necessary security against confusion in shipping laws being secured by an agreement between the several parts of the Empire which would assure concerted action towards the alteration of shipping laws. The Statute therefore was assented to immediately after such an agreement had been duly signed for the United Kingdom and the Dominions on December 10, 1931. It represents an attempt to secure that the Dominions shall accept British standards as adequate for ships registered in the United Kingdom when trading to the Dominions unless engaged in the Dominion coasting trade or in Dominion fisheries. It definitely provides that no part of the British Commonwealth shall deny to ships registered in any other part equal treatment to that meted out to its own ships or to foreign shipping, but this is not to prevent the levy of customs duties on ships built outside that part or the grant of financial aid to shipping registered therein or the regulation of its fisheries. In principle legislation by any part is not to have extra-territorial application to ships registered in any other part without the consent of that part, but this rule again does not apply to regulation of the coasting trade, the

<sup>1</sup> *Union Steamship Co. v The Commonwealth* (1925), 36 C.L.R. 130.

sea fisheries,<sup>1</sup> or the fishing industry, and each part may apply its own standards as to safety of ships, their crews, and passengers to any ships trading to their ports, except in so far as the ship complies with regulations which that part deems equivalent to its own. The question of discipline is left chaotic; so far as the question is not covered by the ship's articles it is to be governed by the laws of the part in which the ship is registered, but this need not apply if the ship is engaged in the coasting trade of another part, or trades from a part of the Commonwealth where the principal place of business of her owners is situated but where she is not registered, and does not trade to the part where she is registered. It is clear that there may be considerable evasion of any control in this way. Shipping enquiries are to be conducted on a basis eliminating the former authority of the British courts. On principle no enquiry into a casualty is to be made save in the part where the ship is registered, but this does not apply when the casualty takes place on or near the coasts of another part of the Commonwealth, or while the ship is engaged in the coasting trade of such a part. The constitution of courts of enquiry and their procedure are to be similar to those provided for in Part VI of the Merchant Shipping Act, 1894, and the Shipping Casualties and Appeals and Rehearings Rules, 1923, with the elimination of the former British control. Thus a re-hearing can no longer be ordered by any administration save that of the part where the enquiry is held, and the appeal from its finding is restricted to a Dominion court similar in constitution and jurisdiction to a Divisional Court of Admiralty in England; the cancellation or sus-

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<sup>1</sup> Canada by Act of 1929, c. 42, has taken wide power to restrict her fisheries to British ships registered in Canada and owned by Canadians, i.e. British subjects resident in Canada, or bodies incorporated therein.

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Of great importance is the effort to secure that there shall remain operative a distinctively British shipping entered on a general registry. Hence it is agreed that no part of the Commonwealth shall register a ship therein with the intent that it shall be entitled to the recognition accorded to British ships unless it is owned wholly by persons who are (*a*) recognised by law throughout the Commonwealth as having the status of natural-born British subjects, or (*b*) naturalised under the law of some part of the Commonwealth, or (*c*) made denizens, or by corporate bodies established under the law of some part of the Commonwealth and having their principal place of business in the Commonwealth. Vessels so owned and registered will possess a common status, and a central registry will be maintained in England where particulars of all registered ships shall be kept, and periodically circulated to each part. Each part of the Commonwealth will determine the national flag to be borne by its registered shipping and will penalise the use by such ships of any other flag or the assumption without due warrant of colours proper to a man-of-war. There will be common standards for certificates of officers, and inter-Imperial recognition.

It is important to note that the obligation imposed by the agreement is modified. It is not in the nature of an agreement, violation of which gives a right of remonstrance and to demand redress if the terms are not carried out in full. The obligation on the Governments is merely to propose

legislation to give effect to the principles enumerated, and, if the legislature fails to accept the proposals, the Government of the part concerned is not affected to the extent that it can be held to have failed to implement the agreement. The point is of crucial importance in the matter of sovereignty. While it is true that a conventional limitation on the exercise of power is no derogation from sovereignty in the strict sense of the term,<sup>1</sup> the position of the Dominion Parliaments is left very strong. They can if they think fit use their newly granted freedom from the application of the Merchant Shipping Act, 1894, to legislate at pleasure regarding any and every ship which trades to their shores and so physically falls within the orbit of their jurisdiction. Any principles adopted are now a matter resting on their wills alone, and this marks the most important extension of power under the Statute. The Merchant Shipping Act, 1894, and its amendments can now freely be dealt with by the Dominion Parliaments as a result of their power under Section 2 of the Statute to repeal Imperial Acts. The Statute adds (Section 5) an immediate release without Dominion action from the rules laid down in Sections 735 and 736 of the Merchant Shipping Act, 1894, under which the Bills of Dominion Parliaments dealing with their registered shipping and the coasting trade had in effect to be reserved for the approval of the British Government. Such measures will in future become operative immediately, and in addition the Dominions will be legally free from the restriction that they must accord to British ships engaged in the coasting trade equal treatment whether locally registered or registered in some other part of the Empire, though the moral restriction of the agreement will remain.

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<sup>1</sup> Keith, *Journ. Comp. Leg.* xii. 30, Permanent Court's judgment in the European Commission of the Danube Case, *Publications*, series B, no. 14, p. 36.

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It is clear that indiscriminate action under the new powers may be fatal to the welfare of British shipping wherever registered, and Canadian authorities have already pressed for the adoption of the system that any deviations from existing law shall only be made after joint consultation and the attainment of common accord. One point of great importance has to be borne in mind. At present under the existing law which will remain until altered by the Dominions, the enforcement of the Act takes place throughout the Empire, and is carried out by British Consuls and Naval courts. Dominion legislation cannot impose duties on these authorities, so that co-operation will be necessary, if there are not to be serious defects in regard to the enforcement of regulations affecting ships registered in one part of the Commonwealth which trade in other parts and evade the jurisdiction of the part of registry. Certain difficulties of the new régime were revealed in the legislation of 1936-7 to forbid transport of munitions to Spain and to supervise the frontiers, as Dominion shipping could not be controlled.<sup>1</sup>

While the parts of the Commonwealth signatory of the agreement do not include the territories dependent on the United Kingdom, it is clear under Article 27 that these parts are to share in the system, for they remain under the supreme legislative control of the Imperial Parliament.

Canada by its Shipping Act, 1934 (c. 34), has offered<sup>2</sup> a vast modern code for adoption generally to replace the British and earlier Canadian Acts. It may be hoped that similar action may take place elsewhere.

(7) The abolition of territorial limitations and the doctrine of repugnancy again explains the removal of all restrictions on the powers of the Dominions to deal with Admiralty

<sup>1</sup> Keith, *Journ. Comp. Leg.* xix. 109, 110.

<sup>2</sup> The Act is held over to be proclaimed in due course.

jurisdiction. The Colonial Courts of Admiralty Act, 1890, which conferred on Colonial courts the jurisdiction exercised by the High Court in England, as then existing, required the approval of the King in Council for rules made by colonial courts of Admiralty, and the reservation or insertion of a suspending clause in colonial measures dealing with Admiralty jurisdiction. The limits of English Admiralty jurisdiction as existing in 1890 were extended in important particulars in 1920, but the Privy Council<sup>1</sup> held that the limits of 1890 still remained applicable to the Dominion courts, and left it uncertain whether these limits could be extended by Dominion legislation or by Imperial legislation only. It was clear that the doubt could not be left unsolved, and the Statute, by authorising the repeal of Imperial Acts by the Dominions, enables any Dominion to legislate as it pleases. Moreover, by Section 6 it removes the necessity of reservation or the insertion of a suspending clause in Dominion legislation and the requirement of the approval of the King in Council for rules made by Dominion courts. The sovereignty of the Dominions is thus asserted in a matter of the highest importance, and of international interest, for admiralty jurisdiction affects vitally foreign as well as British shipping wherever registered.

In the field of Admiralty jurisdiction as of shipping generally there is clearly the utmost desirability of securing uniformity of action in change of law. Just as the Dominions have been urged to make effective the International Conventions reached in 1929-30 on the subject of Safety of Life at Sea and Loadlines, as Canada did in 1931, and Australia in 1934, so they are invited to accept the Brussels Conventions on the Limitation of Shipowners' Liability and

<sup>1</sup> *The Yuri Maru, The Woron*, [1927] A.C. 906, Keith, *The Sovereignty of the British Dominions*, pp. 239-42.

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III. on Maritime Mortgages and Liens. It is plain that, if each part of the Empire acts in isolation, there must be serious discrepancy of results arrived at in shipping cases, and it is to be hoped that Dominion autonomy in legislation may evoke a hearty desire to co-operate with the other maritime nations in erecting a common law for the seas.

(8) The Colonial Laws Validity Act, 1865, in pursuance of its general tendency to recognise the rights of colonial legislatures, expressly provided (Section 5) that "every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or colonial law for the time being in force in the said colony". The constituent power thus recognised is under Section 2 of the Statute no longer applicable to any law made by a Dominion Parliament, but any such Parliament may repeal any Imperial Act applicable to it. The result of this enactment might have been chaotic if it had stood absolutely, and it was from the first recognised that it could not be applied literally to the federations. The provinces of Canada feared lest they should be placed in the position that the British North America Acts, 1867 to 1930, could be altered by the Dominion Parliament alone, whereas prior to the Statute that Parliament had virtually no constituent powers, all alteration depending on Imperial Acts. The Statute, therefore, by Section 7, provides that nothing in it shall be deemed to apply to the repeal, amendment, or alteration of the British North America Acts. Moreover, to make assurance doubly sure, it is made clear that neither the federal nor the provincial

legislatures are enabled by the Statute to legislate on matters not under the constitution in their power already. In like manner Section 8 safeguards the position of the constitution of the Commonwealth, and Section 9 (1) expressly forbids the Commonwealth to make laws on any matter within the authority of the States and not within the authority of the Commonwealth. The constitution of New Zealand is also safeguarded by Section 8, though in that case no federal issue arose. But the extent of power of change is at present disputed, and it was preferred to leave the matter without change. There is no safeguard for the constitutions of the Union or Newfoundland or the Irish Free State inserted in the Statute.

As regards substantive law, therefore, the only real limitations as to alteration of the constitution are those affecting Canada, and they are self-imposed by the inability of provinces and federation, despite many efforts, to reach agreement as to the power of change. Other Dominions have unfettered power to act locally. The one dubious issue is that of the right of legislation to effect secession, and it will be examined below.

(9) The right of petitioning the King in Council for redress for defect of justice in colonial courts is of ancient origin, and the royal prerogative to admit such appeals was early asserted against colonial opposition. Under the Judicial Committee Acts, 1833 and 1844, it was made statutory, and a Judicial Committee of the Privy Council replaced the former system under which appeals were decided more or less haphazard. By becoming statutory the right could not be overridden by any Dominion Act, and the decision of the Privy Council to that effect in *Nadan v. The King*<sup>1</sup> was one of the causes for the attitude adopted by the Dominion at

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<sup>1</sup> [1926] A.C. 482.

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the Imperial Conference of 1926. The only derogations from this right were, therefore, such as were made by Imperial Act. Under the constitution of the Commonwealth (Section 74) no appeal was allowed from the High Court on any issues involving the constitutional rights of the Commonwealth and a State or of the States *inter se* except on the certificate of the High Court, which came to be refused on principle. Under the South Africa Act, 1909 (Section 106), the only appeal from the Union was that, by special leave from the King in Council, from the Appellate Division of the Supreme Court of the Union. Both these appeals, as has been noted, may be curtailed or abolished by reserved Bill. The Statute of Westminster, 1931, by abolishing the supremacy of Imperial legislation, opened the way to Dominion action. Hence Canada abolished in 1933 the appeal in criminal causes, and the Irish Free State that in any case. Both measures have been pronounced valid by the Privy Council.<sup>1</sup> As regards civil causes abolition to be really effective in Canada would require coincident action by the provinces and the federation, which is improbable, but the right to abolish exists, and the appeal certainly is no longer a bar on the sovereignty of the Dominions.

(10) The prerogative of mercy is one of the highest of prerogatives, but its use is necessarily delegated to the Governors-General and they normally, as in Britain, exercise it on the advice of ministers. It is true that under a practice of long standing instructions are given to the Governor-General to use a personal discretion where the grant or withholding of a pardon might affect the interests of other parts of the Empire, but this instruction has for many years remained a dead letter. In view of the local

<sup>1</sup> *British Coal Corp. v R*, [1935] A.C. 500; *Moore v A.-G. for I.F.S.*, *ibid.* 484; *Keith, Journ. Comp. Leg.* xvii. 270-73.

selection of Governors-General it is clear that the responsibility for pardons now has passed into the hands of the local ministry, subject to the usual principles of responsible government affecting the relations of the Governor-General with the ministry. The Dominion Parliaments, of course, possess unfettered authority to limit or regulate as they think fit the exercise of this as of any other prerogative of the Crown applicable to Dominion conditions.

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(11) A different issue is presented by the question of honours, the grant of which is an essential prerogative of the Crown. In part it has been avoided by the reluctance of certain Dominions, including Canada, the Union of South Africa, and the Irish Free State, to put forward recommendations for the bestowal of these marks of distinction, but the issue is still under discussion. The essential limitation on Dominion action is simple. It is due to the fact that in the past and at present honours have been granted which have Imperial validity, for the royal prerogative to grant such distinctions has not been limited in the Dominions by any statute. Under these circumstances the British Government by constitutional usage must have a voice, and hence the rule that honours are bestowed on residents in the Dominions on the recommendation of the Dominion Governments and on the advice of the British Government.<sup>1</sup> There is no derogation from sovereignty in this. On the other hand, it is open to the Dominion Parliaments to legislate to create local honours which might be bestowed on the request of ministers, nor would it be illegitimate for the Dominion ministry to advise the King to create by the prerogative a local order which he then could award on local

<sup>1</sup> The grant of the G.C.M.G. to the Governor-General of the Union in 1937 was proposed by the King and approved by the Union Government, which accepted responsibility for it. But the King no doubt had ascertained that the Prime Minister and Dominions Secretary approved.

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III. advice solely. The Statute of Westminster by its grant of the widest legislative power enables the Dominion Parliaments if they please to negate the use or recognition of titles in their territories.<sup>1</sup> Thus it is clearly open to Canada,<sup>2</sup> if she so desires, to carry out the request long since (1919) vainly made to the British Parliament to legislate so as to bring to an end the validity of hereditary titles granted to certain Canadian residents on the death of the original holders. But the essential fact is that no element of subordination now exists in this matter.

(12) The Statute, as has been seen, removes for the future the essential restrictions on the validity of Dominion legislation. But, as was forcibly argued in the Irish Parliament during the discussion of the terms of the Statute, the mere fact that the Imperial Parliament can remove restrictions implies that it can at will reimpose them. There is in fact a fundamental difficulty which afforded no logical mode of solution. It was long ago felt by Bacon when he commented on the Act of Henry VII. to forbid the punishment by Act of Parliament of any person who assisted a King *de facto* and reckoned it more just than legal. "For a supreme and absolute power cannot conclude itself, neither can that which is in nature revocable be made fixed; no more than if a man should appoint or declare by his will that, if he made any later will, it should be void. And for the case of the Act of Parliament, there is a notable precedent of it in King Henry the Eighth's time, who, doubting he might die in the minority of his son, provided an Act to pass, that no statute made during the minority of a King should bind him or his

<sup>1</sup> The Constitution of Eire allowed in the draft, but not as passed, of the creation of Orders of Merit (Art. 40 (2)).

<sup>2</sup> Any difficulty which may exist depends on whether a title would fall under federal or provincial legislative jurisdiction or both. The point is not simple, but the power exists in Canada.<sup>3</sup>

successors, except it were confirmed by the King under his Great Seal at his full age. But the first Act that passed in King Edward the Sixth's time was an Act of repeal of that former Act, at which time nevertheless the King was minor. But things that do not bind may satisfy for the time." In the case of Ireland in 1782 the mere repeal of the Statute of George I. declaring the legislative subordination of Ireland to the British Parliament was held insufficient by a section of Irish opinion and the process of relaxation of supremacy was completed, as it was held, by the Act of 1783 which explicitly renounced the right to legislate for Ireland.<sup>1</sup> The assumption, however, of the Irish patriots was that the British Parliament never had had the right to legislate for Ireland and that this was an assumed power. No such possibility existed in the case of the Dominions, for the power to legislate for them was evinced by their existence and their constitutions, and even in the case of the Irish Free State the Act of 1922 which confirmed the constitution of the State expressly reserved the right of legislation in such cases as it was legitimate to legislate for the Dominions. It was impossible, therefore, to follow the Irish precedent, and any attempt to do so would have been strongly objected to by the majority of the Dominions, including Canada, the Commonwealth, New Zealand, and Newfoundland.

The only method, therefore, of dealing with the issue was a constitutional convention, and this was expressed both in the preamble to the Statute and as a clause in the Statute itself. No doubt the clause may be regarded as invalid, since it purports to hamper the action of future Parliaments by providing that 'No Act of Parliament of the United Kingdom passed after the commencement of this Act shall ex-

<sup>1</sup> Keith, *Const. Hist. of the First British Empire*, p. 381.

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tend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to the enactment thereof". Unquestionably<sup>1</sup> in strict law, if a subsequent Act of Parliament applied *nominatim* to any Dominion, the omission of the requisite statement of concurrence would be unavailing to prevent it applying to the Dominion. But that is irrelevant. Constitutional conventions are a vital part of the constitutions of the United Kingdom and the Dominions alike, and the possibility of violation of the principle laid down may be regarded as negligible. Moreover, the statutory enactment has a certain limited value as a rule for the construction of statutes, excluding efforts to show that statutes should be understood to have application to the Dominions.

The power given to the Dominion in the section is vaguely expressed, and very properly the Commonwealth Government demanded that the power to be given should be exercised not by the Government of the Commonwealth alone, but by the Government and the Parliament. It is true that it is hardly probable that any Dominion Government would act in the matter without the assent of its Parliament, but the power to act remains, and it is clear that, whatever the views of the Parliament, an Imperial Act might be made to apply to a Dominion on the request of the Government of the day. It must, however, be noted that there is no compulsion on the British Parliament to act on a mere request from a Government, and that in all probability no Act would be passed save with the assent of the Dominion Parliament. Moreover, any Act so passed can, of course, be

<sup>1</sup> The view above expressed has since been confirmed by the Privy Council; see *British Coal Corp v The King*, [1935] A C 500, 520 which disposes of all arguments to the contrary.

varied or repealed by the Dominion Parliament in virtue of the powers granted by Section 2 of the Statute. It cannot, however, be said that this is a complete protection to a Dominion against unwise action by a Government, for the process of legislation is often difficult and lengthy, and, even if the lower house of the Parliament were opposed to the work of a Government, it might be unable to secure repeal through the opposition of the upper house. In view of this fact the action of the Commonwealth in safeguarding the powers of the Parliament appears to be definitely more satisfactory than the acceptance by the other Dominions of the right of the Government to act. The wording of the clause is curious in demanding both a request and a consent to Imperial legislation, but it is clearly not proposed that there should be two stages of the procedure; legislation is to be based on prior intimation of Dominion desire, and not to be brought forward without such intimation.

The necessity of the retention of the power is clear in the case of Canada, whose constitution cannot be altered by a Dominion Act, and it is convenient in other cases also. It might be resorted to for legislation on such vital topics as allegiance or prize law, but the attitude of such Dominions as the Union and the Irish Free State negatives any early likelihood of the employment of Imperial legislation in any such case, its place being taken by legislation in each part of the Commonwealth. The difficulty of securing effective unity of legislation in such cases is obvious, but on the other hand this mode of action has the advantage of stressing the distinct sovereignty of the Dominions. The mere existence of the power, no doubt, is of importance as a factor in the judgment to be formed on the character of inter-Imperial relations, an issue to be considered below. Its emergency value was most remarkably displayed by its use by the

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Edward VIII., described below.

(13) The essential purpose of the Statute is to deal with the position of the six Dominions, Newfoundland being treated for internal purposes exactly on the same footing as the other Dominions. The relations between the United Kingdom and the States of Australia and the provinces of Canada are in the main untouched by the Act, nor do the other concessions as to the position of the representative of the Crown, and in the case of the States the power of reservation and disallowance apply to them. It would have been impossible for the Imperial Conferences to take account of these issues, for at them the States were not represented, and still less the provinces, which never enter into direct relations with the British Government. But the Statute, as has been seen, is careful to secure the States and the provinces alike against any interference with their position as the result of the Statute. Moreover, unexpectedly at the request of Canada a concession was made to the provinces by relieving them in the case of legislation within the ambit of their powers from the fetters of the Colonial Laws Validity Act, 1865, though practically the issue is of minor consequence, for Imperial legislation on the matters within provincial competence is minimal in quantity. In the case of the States a further issue was raised regarding the effect of the rule that no Imperial legislation should apply to a Dominion unless the Dominion had requested and consented to the Act. It was feared that this provision might be read to interfere with the right of the Imperial Parliament to legislate on matters within the power of the States without the assent of the Commonwealth Government and Parliament such as the questions covered by the Fugitive Offenders Act, 1881,<sup>1</sup>

<sup>1</sup> Cf. *McArthur v. Williams* (1936), 55 C.L.R. 324, 359, 360.

and the Territorial Waters Jurisdiction Act, 1878. It is therefore provided by the Statute, Section 9 (2), that "Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence". The failure to ascribe extra-territorial power to the States is important, for, as they control criminal law, the extension of power—if it does not already exist—would be of special value; but in the case of the provinces the withholding of such authority is essential, for the whole plan of the Canadian constitution rests on the restriction of the provinces to legislation of a local character, and an alteration of this fact would have meant a serious change in the framework of the constitution, for which no request had been expressed by the Dominion or the provinces themselves.

A point of some theoretic interest arises from the question of the position of the British forces in the Dominions to which Section 4 of the Statute of Westminster has been or may be applied. As the Army and Air Force (Annual) Act cannot be applied to Canada, the Union of South Africa, or the Irish Free State without their request and consent, the position has been dealt with on the basis laid down in the Visiting Forces (British Commonwealth) Act, 1933, of the Imperial Parliament. That Act contemplates the possibility—as in the Great War—of the presence in the United King-

Chapter III. dom of units of Dominion forces, and authorises the exercise over them by their service courts and authorities of the powers of control laid down in Dominion legislation, and the grant of aid to the authorities in charge of the forces as regards deserters and other matters by British authorities. Similar legislation has been passed in Canada<sup>1</sup> and in the Union of South Africa,<sup>2</sup> which thus provide for the exercise of control over British forces and assistance by the local authorities. It may be taken for granted that where the authority exercised touches matters which fall normally under provincial control in Canada or State control in Australia, when the Statute is adopted there, then provincial or State jurisdiction will be excluded on the ground that the ground is covered by federal legislation, which as dealing with defence is paramount. Constitutionally, of course, the point of interest is the issue of the writ of habeas corpus in the case of persons claiming to be unjustly imprisoned,<sup>3</sup> but clearly it would have been very difficult to give to British or Dominion courts authority which would involve, very possibly, dealing with vital issues of the validity of Dominion or British legislation respectively. But the position is anomalous and innocuous mainly because the presence of large bodies of such forces is not likely to occur.

The case of the Irish Free State, as usual, is *sui generis*. No legislation has been passed there to affect the position of the British forces in charge of the naval defences retained under the treaty in British control (Berehaven, Queenstown, Belfast Lough, Lough Swilly), but these fall partly under the control of the Naval Discipline Acts, which are permanent, and are presumably part of the law taken

<sup>1</sup> 23 & 24 Geo. V. c. 31.

<sup>2</sup> No. 32 of 1932, Keith, *Journ Comp Leg.* xv. 255, 256.

<sup>3</sup> It will, of course, be with the British or local court to decide the preliminary question whether the person concerned is *de facto* a member of the visiting force.

over by the Irish Free State on its formation and continued in existence by Article 73 of the constitution.

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(14) The status of Newfoundland has, since February 16, 1934, been in abeyance as the result of the pressure of financial and economic conditions which resulted in the grant of financial relief by the British Government, at first together with the Canadian Government, and the appointment of a royal commission, representing the three countries, to report on the circumstances of the island. The facts of course were simple. The island is scantily populated—284,800 in 1935 for 42,750 square miles, with 4716 for 120,000 square miles in Labrador. For historical reasons the chief industry has been the cod fishery, and agriculture has been neglected. Inclusion in Canada would have seemed natural, but the opportunity which arose (1864-9) less than a decade after responsible government was conceded was thrown away, and the small colony was allowed to struggle along with feeble resources, and without expert guidance, on primitive lines. A second opportunity for union with Canada presented itself in 1895 when the island suffered from grave economic and financial difficulties arising out of the collapse of the financial and banking system. An admirable chance for Canada taking over charge presented itself, but it was thrown away because the cost would be 657,000 dollars a year, and even so Canada would not assume more than 10,000,000 dollars of the 15,829,000 dollars then due. Canada ignored the gain to her merchants as well as the political advantages, influenced perhaps on the other hand by the international complications with France involved. Certainly Sir Wilfrid Laurier was, when Prime Minister, affected by this aspect, which, however, ceased to count in 1904 when relations with France were arranged by the treaty heralding the *entente cordiale*.

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Unfortunately, successive ministries learned to mortgage the assets of the country, both as regards timber and mines, to outside organisations in return for payments which were recklessly expended in current needs, including an ever-increasing amount of work on roads or direct public relief which merely accustomed the people to live off governmental doles.<sup>1</sup> The belief in the existence of substantial resources, and the widespread confidence in the soundness of the finance of the Dominions, led to loans being readily forthcoming from investors in the United Kingdom, especially since the British Government too long continued to admit Newfoundland loans to trustee rank, and later from investors in the United States. Meanwhile, nothing was done to modernise the cod fishery, and to meet the growing competition, while the fall fishery was allowed to decline, and the people permitted to degenerate in physique and enterprise. Complete default with the resulting further degradation of the low standard of living was inevitable, if British aid were not forthcoming, as Canada disinterested herself when the extent of the *débâcle* was realised. The British Government, therefore, determined to give aid, conditioned necessarily by being placed in a position to undo past errors. This meant the supersession of the constitution granted by letters patent of 1876, amended in 1905, and the substitution of Crown Colony rule. But the condition was felt just and unavoidable, and in view of the state of public opinion it was felt legitimate to proceed without any referendum or general election. In the Assembly the address asking for the suspension of the constitution was passed unanimously, in the Council two members abstained. Since then the objection has been pressed that the issue should have been raised by reference to the electorate; to this the only answer is that,

<sup>1</sup> Parl. Pap. Cmd. 4479-81 (1933); Keith, *Journ. Comp. Leg.* xvi. 25-39.

if the matter had been strongly felt at the time, petitions against the proposal should have been addressed to both houses of the Imperial Parliament, and to the Crown, and public meetings in Newfoundland should have emphasised dissent. As it was, Parliament was reasonably entitled to assume that there was no grave objection felt on any side.

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The new constitution<sup>1</sup> is based on the introduction of British experts to carry through vital reforms. All executive and legislative power, therefore, is vested in the Governor and six Commissioners constituting a Commission of Government. The three British experts—paid by Britain—are in charge of Finance, including customs, income tax, and the post-office; of Natural Resources, including marine and fisheries, forests, agriculture, and mines; and of Public Utilities, including public works, railways, steamship, and other communications, and the Government hotel. They thus deal with revenue, expenditure, the development of the island, and the use of its resources. The Newfoundland Commissioners deal with Home Affairs and Education; Justice; and Public Health and Welfare. In executive matters the Governor can override the majority of the Commissioners, but not as regards legislation. But in both matters he is subject to the authority of the Dominions Secretary, and the three British experts are ultimately under the authority of the Secretary of State. The period of suspension of the constitution is indefinite; it has always been asserted to be merely a suspension, so that in due course Newfoundland may resume Dominion status. If so, she may rank with Southern Rhodesia and Burma, which have still to attain that goal.

Among the matters to be reformed the Civil Service took

<sup>1</sup> Newfoundland Act, 1933 (24 Geo. V. c. 2), and Letters Patent and Instructions issued thereunder, Jan. 30, 1934.

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an important place. The spoils system there was rampant, with the result that there was a dearth of experienced officers, able to advise ministers and to secure continuity of administration and policy. Reforms undertaken include security of tenure for efficient officers, regularised entry with educational tests, promotion by merit, improved salaries, pensions, and the elimination of political and denominational intervention. The latter has prevailed since 1861 when fierce electoral riots led to an effort to secure peace between the factions, and it has been a convention that in giving appointments or contracts equality must be roughly preserved between adherents of the Church of England, the Roman Catholic Church, and the sects now gathered into the United Church of Canada. It is also proposed to establish effective municipal and local government authorities, as the only way to terminate the hopeless practice under which the legislature was largely engaged in the demoralising business of making grants for local purposes, whose destination was in practice mainly determined by the member of Parliament who secured the grant, and whose tenure of his seat depended largely on his success in furthering the interests of his constituents and himself in disregard of the public welfare.

Britain, it must be added, has made large pecuniary sacrifices to maintain Newfoundland credit by rendering a just settlement with her creditors possible, and by meeting recurrent and relatively large deficits on revenue account, while striving to ameliorate the position of the people, to give them better social and economic conditions, to foster education, and improve their means of livelihood. Matters, however, remain profoundly unsatisfactory. On January 19, 1937,<sup>1</sup> the Dominions Secretary admitted that 65,000 people

<sup>1</sup> See Report for 1936, Cmd. 5425.

were receiving relief, that the economic position in 1936 had been worse than in 1935, owing to a bad cod-fishing season, and restriction of imports into Italy and Spain, but he hoped that the commercial agreement<sup>1</sup> of November 6, 1936, would prove of advantage in securing a larger importation into Italy. It has proved impossible so far to accomplish much substantial reform, and it is not surprising that some discontent should be felt locally with the suppression of all control of the administration without the expected rapid restoration of prosperity. But the roots of the difficulty are too deep to be readily eradicated. What may, however, be necessary, if progress is to be long delayed, is to establish some advisory body to aid the Commission. Indefinite government by Crown Colony methods of a community of Europeans with 78 years of responsible government is contrary to the genius of the British race.

It seems clear that Newfoundland lacks the necessary resources for the development of Labrador, assigned to her in generous measure by the award of the Privy Council on the reference of the boundary question by the two Governments.<sup>2</sup> Canada, naturally, refused an offer of sale at about 100,000,000 dollars as excessive, for development has all to be carried out, and Canada herself has vast areas on which to work. If anything is to be done, either Britain or a chartered company would have to act, but the issue seems far from urgent for the moment, though further expenditure on the provision of medical aid and government is due.

Federation would relieve the position, allow provincial responsible government to be restored, and place development in competent hands. Canada already controls the banking system; Newfoundland children are often educated there; Canadian capital is invested in the Bell Island mine

<sup>1</sup> Cmd. 5345 (Art. 2).

<sup>2</sup> (1927), 43 T.L.R. 289

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and the Corner Brook mill; 50 per cent of the island imports are derived from Canada; and the Methodists of Newfoundland have accepted inclusion in the United Church of Canada. But the obstacles in the way of federation are also serious. There is the historical tradition of dislike of the French, dating from the old days of rivalry, that of hostility to Canada, marked ever since federation was deliberately rejected in 1869 by the electorate. The people have been proud of their independent status, and value highly their relations with the United Kingdom direct. There are material considerations of importance. The storekeepers realise the danger of competition with the great retail businesses of Canada; the farmers fear competition from hay and vegetables; the manufacturers feel that their small concerns would be ruined under a régime of free trade. Ottawa, again, it is argued, is far off; Newfoundland representation in Parliament there would be negligible, and the fate of the Maritimes under federation has been relative loss of population, and decline in prosperity, for their manufacturers have, under free trade, been overwhelmed by those of Ontario and Quebec, and their representation in the House of Commons is dwindling away with the growth of population in the western lands. Canada, it is remembered, has her own fishery interests to conserve, and in 1890-92 she deliberately used her influence with the British Government to secure the refusal of assent to the accord reached between the Newfoundland and United States Governments. Canada, it may be added, has come to the conclusion that the time is not ripe for efforts to win Newfoundland over. If and when the island has been rehabilitated by British expenditure, the position may assume a different aspect. It may be added that one of the least satisfactory features of the position since 1895 has been the various

obscure intrigues by which politicians and capitalists in Newfoundland and Canada have endeavoured to create a position suitable for bringing the island into the Dominion. Much money has been in this way expended with none but unsatisfactory results.

## CHAPTER IV

### THE DOMINIONS AND THE UNITED KINGDOM: THE CHARACTER OF INTER-IMPERIAL RELATIONS

Chapter IV. As against the evidence adduced in Chapter II tending to emphasise the distinct character and sovereignty of the Dominions, there must be set certain facts which to some extent modify that character. The King often appears to act distinctly and separately for each Dominion on the advice of the Dominion Government, but there remain certain issues on which the Dominions and the United Kingdom are in agreement to act jointly.

(1) The United Kingdom and the Dominions recognise the same sovereign, and the fact is solemnly recorded in the preamble to the Statute of Westminster in accordance with the decision of the Imperial Conference of 1930: "It is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the throne or the royal style and titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom". The declaration thus solemnly asserts that any change in the succession must be made by common action, and it is inevit-

able that the conclusion should thence be derived that the union of the parts of the Commonwealth is one which cannot be dissolved by unilateral action. This was the sense given to the proposed clause when it was accepted by the Conference of 1929 by General Smuts,<sup>1</sup> who naturally insisted that the intention of the preamble was to negative the idea of the right of any part of the Commonwealth to sever itself from the rest, save as the result of common assent. Obvious and indeed unavoidable as this interpretation is, it was necessarily repudiated by General Herzog, when his attention was called to the fact that the agreement of 1929 seemed deliberately to negate his favourite theory of the right of secession. He obtained, therefore, from the Houses of Parliament a rider to the resolutions accepting the report of 1929 to the effect that acceptance of the clause in question did not affect the right of any Dominion to secede, and he announced his intention of securing from the Imperial Conference of 1930 formal endorsement of this doctrine. The reports of the proceedings of the Conference are silent on this head; it would indeed have been utterly impossible for the British Government or the Governments of any of the Dominions without the prior approval of their Parliaments to homologate in any form the doctrine of the right of secession, and a certain ludicrous side of the contention was illustrated by the *bon mot* of the Secretary of State for Dominion Affairs who assured the press that no one doubted the right of a Dominion to secede any more than one could doubt the right of a man to cut his own throat. The Conference, it seems from General Herzog's guarded and vague assertion on his return from it to the Union, noted his contention; it could hardly do less. What is obvious and is

<sup>1</sup> Keith, *Journ. Comp. Leg.* xii. 281, 282 No other intelligible sense can be given to the clause.

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never denied is that, if any Dominion should really decide to sever itself from the Empire, it would not be held proper by the other parts of the Empire to seek to prevent it from doing so by the application of armed force. This is a doctrine which was recognised as early as 1920 by Mr. Bonar Law, and has often been admitted since. Most recently it was made clear in the discussions of the attitude of the Irish Free State in the matter of the oath and the withholding of the land annuities and other payments due to the British Government that, if the Free State should determine to declare itself a republic, the British Government would not make war to prevent such a result. But that view, of course, has nothing to do with the legal aspect of the case.

From the legal point of view the matter is *prima facie* simple enough. The Dominions were created as organised Governments under the British Crown, and there is no provision in their constitutions which contemplates that they have the right to eliminate the Crown, or to sever their connection with it. The language of the British North America Act, 1867, is emphatic; the Act was passed to unite the provinces in a federal union under the Crown of the United Kingdom. The Commonwealth of Australia Constitution Act, 1900, is based, as the preamble states, on the agreement of the people of the colonies of Australia to unite in one indissoluble federal Commonwealth under the Crown of the United Kingdom. The South Africa Act, 1909, was passed in order to unite the colonies in a legislative union under the Crown of the United Kingdom. The Irish Free State was created by an agreement which assigns to it the same place in the Empire as is enjoyed by Canada, and the Constitution Act, 1852, of New Zealand and the letters patent of 1876 giving constitutional government to Newfoundland are clearly ineffective to confer on these

Dominions any power to eliminate the connection with the Crown, apart from the absurdity of these Dominions being thought capable of desiring such a result. It is not surprising that in face of these facts General Smuts has consistently maintained in the past, and even now perhaps holds, that even the King himself could not with due regard to his duty assent to a measure of a Dominion Parliament purporting to destroy the connection with the Crown, and that still less could the Governor-General exercise the power.<sup>1</sup> It is indeed now seriously open to argue that to effect separation there would in law be necessary an Imperial as well as a Dominion measure, and that under the principle enunciated by the Statute of Westminster the concurrence of the other Dominions would also be requisite.

On the other hand, arguments are brought by or for General Herzog which insist on the divisibility of the Crown. Stress is laid on the fact that the Imperial Conference proclaimed that Great Britain and the Dominions were autonomous communities within the British Empire, "equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs", and it insisted that it cannot be supposed that Great Britain would be unable to sever herself from the Dominions, which by parity of status must have a like right to secede. But the assumption that the declaration of the Imperial Conference creates a legal situation goes much too far. The Conference of 1926 laid down a programme, and nothing that has come from it supports this interpretation of its meaning. On the contrary we have the preamble to the Statute of Westminster to suggest that those who have carried out the intentions of the Conference of 1926 have stressed rather the

<sup>1</sup> He remained silent on the issue in connection with the Abdication and Coronation Oath Acts, 1937.

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following words of the statement above cited, "though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations". It must, secondly, be borne in mind that the allegation that Britain could sever the connection with the Dominions is unsupported by any British claim. On the contrary, the British view as reflected in the preamble seems to be that, while the association is free, that does not mean that it is open to any member of the Commonwealth to break it. The obvious parallel is the union of the States of America. Completely free as that was, when the proposal to secede came forward, it was speedily found that the union had so coalesced that it could not be broken.

While General Hertzog is precluded from seeking to enact secession by his coalition with General Smuts, and very possibly himself is no longer anxious to establish an internationally insignificant republic, when Germany shows unmistakable signs of the desire to keep alive the question of the sovereignty over South-West Africa, certain steps taken by him show clearly that he is determined to assert the divisibility of the Crown, and to provide the means whereby to make effective the division if that should be proved desirable. He claimed in his correspondence with Nationalist friends that the Status of the Union Act, 1934, embodied that doctrine, but it is not clear exactly by what means. Section 5 of the Act defines the term "heirs and successors" in the South Africa Act, 1909, as meaning His Majesty's heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland as determined by the laws relating to the succession to the Crown of the United Kingdom and Ireland. This provision is curious, and the apparent blunder of the use of the United Kingdom of Great Britain and Ireland when the proper style is now

United Kingdom of Great Britain and Northern Ireland is probably deliberate, for the succession is regulated by the Act of Settlement, 1701, and the Acts of Union with Scotland and Ireland of 1707 and 1801, and does apply to the older form of the United Kingdom. Presumably the point of the enactment is to make it clear that the Union has a sovereign of its own, though the British line is to occupy the throne pending further legislation. It must be noted that this places the Crown in a different position from that of the Crown of Hanover, which is so often adduced as a parallel. The Crown of Hanover was always distinct because the lines of succession were different, and that point is vital. So far as the Act goes, the Crowns are inseparable, not divisible.

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But the case for divisibility may be strengthened by the facts relating to the royal abdication of 1936. The existence of the preamble to the Statute of Westminster then raised serious difficulties, for there was urgent need for haste, and the passing of British legislation would no longer suffice without Dominion concurrence, while no Government save that of the Commonwealth of Australia was in a position to secure immediate action.<sup>1</sup> Canada decided to express executive request and consent to the British legislation under the powers given by Section 4 of the Statute of Westminster, and to ask Parliament on assembling to homologate its action, and approval was duly accorded in the form of an Act as opposed to the Australian resolutions. Even apart from that action the change of sovereign effected by His Majesty's Declaration of Abdication Act, 1936, would have taken effect under the British North America Act, 1867, s. 2, which defines the meaning of the term "Queen". For Australia to which the Statute of West-

<sup>1</sup> Resolutions were passed by both Houses on Dec. 11, 1936, before the Imperial Act received assent.

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minster does not yet apply, the assent of Parliament by resolutions and the Imperial Act provided the necessary change taken in conjunction with the definition clause in Section 3 of the Constitution. New Zealand was content with executive consent, the Imperial Act and the Interpretation Act. But the Union was in different case. With remarkable illegality the British Government asked for the request and consent of the Union, ignoring, no doubt deliberately, the fact that under the Status of the Union Act, s. 2, no Act of the Imperial Parliament passed after the Statute of Westminster can apply to the Union unless extended to it by Act of the Union Parliament. To accept this proposal would have been to admit that the section in question of the Union Act was *ultra vires* as an effort to diminish the force and validity of the Statute of Westminster. Naturally no thought of such an admission entered General Hertzog's head, and instead he developed the theory that abdication took place by mere declaration of the sovereign, and that accordingly the King's signature on December 10, 1936, of the instrument of abdication had immediate effect, and that *ipso facto* the Crown passed on to George VI. Hence the Union Government merely expressed assent to the Imperial Act, not as giving Parliament any right to legislate for the Union but as approving in a spirit of benevolence the action which was being taken to remove a difficult situation. The legal side of the issue was dealt with in a different way. An Act was passed when Parliament met—His Majesty King Edward VIII.'s Declaration of Abdication Act, 1937, which declares that the Instrument of Abdication had full effect from its date and that everything done by George VI. or the Governor-General as his representative thereafter is and has always been of full force and effect. At the same time validity is given to everything done

in the name of the late King from abdication up to the passing of the Union Act as equally valid. Quite consistently also the Act enacts for the Union the exclusion of the issue of the ex-King from the succession, and the non-application to him and his issue of the Royal Marriages Act, 1772. It will be seen that by this action there was a period when the Crown was divided, for George VI. reigned for a day in the Union while Edward VIII. was still in the eyes of the whole of the rest of the Empire still indisputably King. General Hertzog was naturally charged with having communicated with Edward VIII. as King immediately after his abdication, but he quite properly<sup>1</sup> disclaimed any motive other than personal courtesy, the royal message having been sent by Edward VIII. as King. The episode is very interesting because it was deliberately planned. Otherwise the position was perfectly simple. The change in the line of succession in the Union would have taken place automatically under Section 5 of the Status of the Union Act on the passing of the Imperial Act, whether the Union acted or not, and the executive assent to the legislation would have sufficed to remove any suspicion of the Imperial Government overriding the Union. But this obvious fact would have destroyed the doctrine of divisibility, and had to be ignored. The difficulty, of course, is that Edward VIII. did not claim that his abdication could be effective *ipso facto*, but asked that effect be given to it. On the whole the better view is that legislation is necessary to make an abdication valid. The issue is in a sense academic, but General Hertzog's view is in this concrete instance rendered invalid by the fact that the King himself did not claim the right to abdicate without Parliamentary action.

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<sup>1</sup> It is, of course, possible that the theory was an afterthought, but this is uncertain.

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It must further be added that, if secession were to be insisted upon, use could unquestionably be made of the power of the Governor-General to assent to a Bill for that purpose, despite the objections of the King himself. But, for reasons which will be indicated below, connected with the common allegiance, it may safely be said that such an Act would be quite unsatisfactory without an Imperial Act to accompany and complement it, apart altogether from any other consideration. General Smuts' theory that such an assent would in the nature of things be invalid is difficult to support, and seems rather to be a political than a legal objection.<sup>1</sup> The question, however, cannot be dismissed as merely theoretic. The strength of the Nationalist element in the Union is very high;<sup>2</sup> it is quite possible that, after the disappearance of Generals Hertzog and Smuts from the field, the trend to Nationalism will grow stronger, and the fact that most British observers regard the republican ideal as foolish is merely proof that they do not understand any ideals except their own. They forget that republicanism in Britain has died out as a serious faith simply because the sovereign and the royal family fulfil so many functions satisfactorily that it is difficult to adduce any argument for republicanism more satisfactory than, first, the expense of the royal entourage, which is unquestionably high but not a serious burden on a wealthy and naturally extravagant people; and, secondly, the encouragement given by a Court to snobbery, doubtless a true indictment, but one of the people rather than of the sovereign.<sup>3</sup> The absence of such per-

<sup>1</sup> The decision of the Appellate Division in *Ndlwana v. Minister of the Interior*, April 5, 1937, is evidence that it would accept any Act.

<sup>2</sup> In 1926, 57.5 per cent. of the European population was of Dutch, 33.7 of British origin.

<sup>3</sup> These points were stressed in May 1937 in the Commons Debates on the Civil List Act.

sonal contacts in the Union, racial feeling, bitter memories, all tend to render republicanism a creed which cannot be expected easily to die because it can be shown to British minds to be illogical. To ignore sentiment in politics leads only to false beliefs which are dangerous guides to action.

In the Irish Free State the doctrine of the divisibility of the Crown never appealed so strongly either to Mr. Cosgrave or to Mr. De Valera as that of eliminating the Crown from all functional connection with the State. It was Mr. Cosgrave's Government which did its best to obliterate all trace of the Crown from the army, the civil service, the courts, the stamps, the coinage, and which secured in external affairs direct relations with the King<sup>1</sup> in order to make it clear that the King in the Free State was not in organic union with the sovereign of the United Kingdom, and in opposition, when the task of elimination was in abler hands, it was Mr. Cosgrave who urged that the divisibility of the Crown should be proclaimed *urbi et orbi* by the recognition of General Franco as the head of the legitimate Government in Spain when the rest of the Empire recognised the established constitutional government. The policy of Mr. De Valera took advantage of the opportunity furnished by the royal abdication, and the Constitution (Amendment No. 27) Act eliminated the Crown from all connection with internal government for purposes of executive, legislative, and judicial affairs, but, as has been shown, it left open the use of the sovereign for the purpose of accrediting diplomats, granting consular exequaturs, and concluding treaties proper. The Executive Authority (External Relations) Act, 1936, recognised the change of throne but only with effect from December 12, so that Edward VIII. reigned one more

<sup>1</sup> Keith, *Journ. Comp. Leg.* xiv., 109, 110.

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The attitude of the Irish Free State to the right of secession is simple enough. It is claimed that the legislature may establish a republican constitution at will, and that a republic could be proclaimed for the Free State area, but that such a step will not be taken since it would militate against the prospect of a united Irish Republic. It may be noted that so far the Supreme Court has never had occasion to pronounce whether the Irish Parliament possesses the supreme authority of constitutional change which it asserts, for no case has yet come before it where the necessity of accepting that dogma has arisen, and on occasion the supremacy of the constitution has been energetically maintained. The Constitution of Eire also evades the republican issue, while ignoring save indirectly the Crown, but it solves the judicial issue<sup>2</sup> by requiring judges to swear to give effect to the constitution, vacating the office of any who refuse, and it justifies acceptance of the obligation by the use of the plebiscite.

It is clear that this element of indissolubility confers on the connection of parts a distinctive character. It makes the relation very different from the mere personal union between the United Kingdom and Hanover, where the connection could be and was broken as a result of the different laws of descent of the Crowns of the two territories, when Queen Victoria succeeded to the throne in 1837. It is of interest that the compromise offered in 1921 by Mr. De Valera, as a substitute for full membership of the Empire on the part of Ireland, nevertheless contemplated a measure of recognition

<sup>1</sup> Keith, *Journ. Comp. Leg.* xix 105-09, *The King, the Constitution, the Empire, and Foreign Affairs, 1936-1937*, pp. 11-13, 23.

<sup>2</sup> Arts 58 and 62, on the republican issue, see Mr. De Valera, *Dáil*, June 14, 1937.

of the King as head of the several parts of the territories with which Ireland would be associated.

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(2) Closely connected with the question of the common Crown is that of common allegiance. The issue might rest, of course, on the old decision in *Calvin's Case*,<sup>1</sup> after the union of the Crowns of England and Scotland in the person of James I., that persons born in Scotland after the union were natural-born English subjects, despite the absolutely distinct character of the two kingdoms. The same doctrine was applied during the period of the union of the Crown of England with the Electorate of Hanover. Even were each of the Dominions to be regarded as an absolutely distinct Kingdom, the subjects of the King therein would on that doctrine be subjects in the United Kingdom. Historically, of course, the position is simpler. The nationality of persons in the Dominions has rested on the doctrines of the English common law which have been applied to the Dominions, whether acquired by settlement or by conquest, as in the case of part of Canada and the Union of South Africa. The growth of the Dominions towards sovereignty has, however, inevitably produced the tendency to distinguish by legislation from among the wide class of British subjects specific types of Dominion nationals, a step first taken by Canada, and since adopted by the Irish Free State and the Union. The Imperial Conference of 1930 felt it necessary to consider the issues thence arising, when it was determined to accord by the Statute of Westminster power to the Dominions to repeal even the British Nationality and Status of Aliens Act, 1914, which defines what persons shall be deemed natural-born British subjects. The Act was intended to have Imperial validity, and doubtless that was its true effect, so that

<sup>1</sup> Dicey and Keith, *Conflict of Laws* (1932), p 144, *Isaacson v. Durant* (1886), 17 Q.B.D. 54.

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prior to the Statute of Westminster it was not possible for any Dominion to vary this essential definition.

The Conference emphasised the importance of maintaining the existence of a common status to facilitate intercourse and the granting of mutual privileges, and recommended that, if any changes were desired in the existing requirements for the common status, provision should be made for the maintenance of the common status, and the changes should only be introduced, in accordance with the existing practice, after consultation and agreement among the several members of the Commonwealth. Each member of the Commonwealth had the right to define its own nationals, but they should as far as possible be persons enjoying the common status, though local circumstances or special conditions might at times compel deviation. The possession of the common status in virtue of the law for the time being in force in any part of the Commonwealth should carry with it the recognition of that status in every other part. This cryptic utterance seems to have been largely motived by the dislike of using the term British subject, as abhorrent to the Union and the Free State. But, apart from that, its meaning was obscure. Mr. McGilligan for the Free State declared that it meant that there was no common Dominion nationality based on a single law, there was not indeed a single Commonwealth nationality at all or even a dual nationality.<sup>1</sup> The Irish Free State national was that and nothing else, both in foreign countries and by the recognition of the rest of the Empire. The significance of this declaration becomes clearer with the Irish Nationality and Status of Aliens Act, 1935,<sup>2</sup> which seems to give logical effect

<sup>1</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 240, 241.

<sup>2</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 150-56; *The King, the*

to Mr. McGilligan's assertions. The Act abolishes the British Nationality and Status of Aliens Acts, 1914 and 1918, as continued no doubt in the State under the Constitution, Article 73, and the common law of nationality, in order that Irish citizens may be in the State and outside recognised as such only. The aim is clearly to abolish as far as possible the status of British subject or national, and thus to assert the fundamental independence of the State. It is, however, very difficult to say what the effect of the legislation is. It is impossible to ignore the Statute of Westminster, and to say *simpliciter* that Irish citizens remain British subjects while in the State under British law. It seems more consonant with the authority due to the Statute and to the Irish Parliament to suppose that in the State, Irish citizens are such only, but that outside they assume the aspect of British subjects, and so can make, like Mr. Bernard Shaw, the best of both worlds, enjoying Irish citizenship when visiting Dublin, but being a British subject or Irish national as fancy prefers in foreign lands. There is, of course, ample room for possibilities of difficulty, for a foreign State might wish to deny an Irish citizen some privilege granted to British subjects. But in that case the British Government might, though it need not, take up the cudgels for its subject. It may be noted that up to 1930 some difficulty arose in affording British consular assistance to Irish citizens described *eo nomine* on the passports issued at Dublin, but that difficulty was cured by adding a qualification so that an Irish citizen was styled "a citizen of the Irish Free State and of the British Commonwealth of Nations". The creation of Irish consulates, however, relieves in a minor degree this difficulty, but they are too few to allow of reliance on them

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*Constitution, the Empire, and Foreign Affairs, 1936-1937*, pp. 30, 31, 58, 59, 77-9, 93, 94, 98-104.

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A further difficulty, however, should be noted. In view of the Irish legislation of 1935, will children born in its territorial limits after the date of that Act be British subjects at all? The answer is that in the eyes of British law they will be so, outside the Free State at any rate, because they will be born in the British Dominions and allegiance. The first point cannot be contended against. The Free State never severed in external affairs her connection with the Commonwealth, but reasserted it by declaring her intention to use the King as the symbol of co-operation with the rest of the Commonwealth, and Article 1 of the Treaty of 1921, which gives the State the status of a member of the Commonwealth, was also reaffirmed. The point regarding allegiance is less easy, but on the whole it must be held that persons born on Free State territory still owe something which can be described as allegiance in virtue of the King's authority in external affairs.

It must be added that the practical disadvantages of the Free State legislation, and of the Aliens Act, 1935, which makes all British subjects, not Irish citizens, aliens, have been reduced to a minimum by the issue forthwith of an Order granting to all British subjects exemption from the provisions of the Aliens Order affecting ordinary aliens, and from the provisions of the Act itself restricting change of name by aliens. What can be said is that the legislation aims at lessening the tie of a common allegiance, and that in some measure it does so, though it may be suspected that few people can even attempt to understand a legal position which can only be elucidated by the courts. Moreover, it

<sup>1</sup> At the Imperial Conference of 1937 the British Government reiterated its readiness to protect all British subjects; no doubt if any Dominion had special treaty rights in any country but no minister, the British representative would claim these rights on request; cf. Parl. Pap. Cmd. 5482, p. 27.

must be remembered that nothing the Free State can do under the Statute of Westminster can affect the view taken by British law of the effect of the British Nationality and Status of Aliens Act, 1914, and its amendments as part of British law applying to Irish matters. As noted above, the power of a Dominion Parliament to repeal British Acts is a power to repeal them as law in the Dominion, not as British law relative to a Dominion. To speculate on a legal issue so complex would here be out of place.

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The Constitution of Eire characteristically evades the issue. It omits, as has been seen, any direct reference to the association of the State with the British Commonwealth of Nations, but at the same time contemplates the use of the Crown—vaguely hinted at in Article 29—as an instrument in the conduct of external affairs. That fact, taken in conjunction with the remarkable acquiescence of Mr. De Valera in the mention of Ireland as among the territories which the King, in the revised form of the Coronation Oath, swore to govern according to law, may be regarded as, on the whole, sufficient to justify the view that persons born in the limits of Eire are still, when outside the territory, British subjects. Nor can the fact be overlooked that on the final discussion of the Constitution of Eire, which resulted in its passing (June 14) by 62 votes to 48, Mr. De Valera categorically stated that the Constitution would have contained a clear declaration of a republic but for the existence of Northern Ireland. Without necessarily taking this statement too seriously—for Northern Ireland is always there—it shows that even under the Constitution of Eire there is connection with the British Crown sufficient to justify us in holding that persons therein born are still, in all areas in which the British Nationality and Status of Aliens Act, 1914, or Dominion Acts of like tenor operate, British subjects even

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if also Irish nationals or citizens.

The Union of South Africa is inclined to the doctrine that double nationality has dangers, and the official doctrine repudiates the idea that there is any such nationality. The position is a little difficult, for the British Nationality in the Union and Status of Aliens Act clearly refers to British Nationality as existing in the Union, and the subsequent Union Nationality and Flags Act, 1927, did not repeal the earlier Act. It is plain, therefore, that a double nationality does exist exactly as it exists avowedly and undeniably in Canada. It is very difficult in the face of these facts to accept as precisely correct the repeated assertions<sup>1</sup> that the Imperial Conference of 1930 recognised one nationality alone in each Dominion. No Conference can alter British law, and it will require legislation in the Union as in the Irish Free State to extinguish the British nationality of its people. Nothing of course is more absurd than the attempt under the present law to distinguish British subject and British national. In British law the two things are the same, and, if they are to be sundered, they must be sundered by legislation, and that legislation, to have more than restricted effect, will have to be Imperial. It is hardly likely that Britain will soon or easily consent to break the connection of the terms, which would mean tampering with the doctrine of allegiance. Efforts to induce favourable consideration of the Union difficulty by the Imperial Conference of 1937 were intimated,<sup>2</sup> and one suggestion made current was that "subject of the King" might replace "British subject" as a description of the common status. It seems wholly undesirable that, to meet the wishes of one Dominion, the

<sup>1</sup> General Hertzog, House of Assembly, April 6, 1937.

<sup>2</sup> See Keith, *Manchester Guardian*, May 17, 1937; *Morning Post*, May 24, June 18, 1937.

time-honoured laws of the Empire should be changed. The underlying motive, of course, is to emphasise the divisibility of the Crown, and to minimise the connection based on common allegiance which was asserted to be the essential bond by the Imperial Conference of 1926, whose declarations receive respect in the Dominions chiefly when they tend towards the destruction of any real connection between them and the United Kingdom. Their right to destroy the connection or minimise it into nothing tangible is entirely within their hands, and it is an obvious duty of their Governments to pursue this ideal if they believe it will make for the well-being of their people. But as a matter of argument it should not be based on the findings of a Conference of 1926, which intended to preach autonomy indeed, but autonomy as the pre-requisite of effective co-operation. The negative side of the Dominion attitude may fairly be deemed unfortunate.

Happily the Imperial Conference of 1937 refused to be induced by General Hertzog to express any approval for the abolition of the term "British subject" as the designation of the common status. The argument adduced was well framed; it was not proposed that any change should be made in the existing position regarding the common status, but it was pointed out that, in the absence of rules for determining the part of the Commonwealth with which any person has a particular connection, difficulties might arise with regard to such matters as immigration, deportation, diplomatic action, treaty rights and obligations,<sup>1</sup> and extra-territorial legislation. It was suggested that such difficulties could be overcome if each of the members of the Commonwealth were to undertake to introduce legislation—as had been done in Canada, the Union, and the Free State

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<sup>1</sup> See Chapter VI (2), *post*.

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IV.—to define their nationals or citizens. Fortunately some members declined to accept the suggestion. It would have been strange were it not so. If any Government proposed to make those born in the United Kingdom nationals thereof instead of British subjects *simpliciter*, it would have difficulty in securing acceptance of the proposal. If, again, Australia<sup>1</sup> or New Zealand were to legislate in this sense, they would expose themselves to the feeling in Britain that they were losing in this way their claim to be regarded as essentially British subjects. These Dominions in view of the population issue need to be able to rely on the co-operation of the people of the United Kingdom, and therefore to maintain their solidarity with that country. The Labour party's ideal in the Commonwealth to hold aloof from external affairs and to concentrate on local defence is clearly vain, for, once Australia shows herself indifferent to the United Kingdom, her fate will be determined.

The Conference, therefore, merely laid down some obvious principles to avoid the inconvenience arising from the fact that a person may belong simultaneously to more than one member of the Commonwealth. Each member will include members of its community or its subjects—the phraseology<sup>2</sup> is more popular than precise—(a) persons who were born in, or became British subjects by naturalisation in, or as a result of the annexation of, its territory and still reside there; and (b) persons who, coming as British subjects from other parts of the Commonwealth, have identified themselves with the community to which they have come. All that is very reasonable, but no effort of the imagination will suggest that it leaves matters very clear. But *prima facie*

<sup>1</sup> For legal objection to local nationality see *A.-G. v. Ah Sheung* (1906), 4 C L R 949.

<sup>2</sup> Used in the press summary (*The Times*, June 12, 1937).

each member of the Commonwealth will internationally be concerned for the persons above described, leaving to the United Kingdom the obligation of dealing with all uncertain cases. Plainly the rule is of minor importance, unless it can be made the basis of British legislation for the deportation from Scotland or England of indigent Irish immigrants who become a charge on the rates, an unlikely consummation in view of the unwillingness of the British Government to offend Irish susceptibilities.<sup>1</sup>

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Much more important was the fact<sup>2</sup> that the British Government, inspired perhaps by the support of Australia and New Zealand, asserted emphatically its view that it would make no distinction between different classes of British subjects as regards the grant of civil and political rights or the right of entry into and residence in the United Kingdom. Further, it stressed the fact that the wide differences existing between the large number of separate territories, legal jurisdictions, and races for which the United Kingdom was responsible would render impracticable the adoption of any single classification which would be in any real sense analogous to that expressed by the terms "national" or "citizen" or "member of the community" in the case of other members of the Commonwealth. It was further pointed out that in foreign countries, where there was no separate diplomatic or consular representation of a particular member of the Commonwealth, His Majesty's representatives, appointed on the advice of the United Kingdom Government, were prepared to afford protection and assistance also to British subjects belonging to that member. No change in this practice was contemplated or desired,

<sup>1</sup> Keith, *Letters on Current Imperial and International Problems*, 1935-1936, pp. 52, 53.

<sup>2</sup> Parl. Pap. Cmd. 5482, pp. 23-7.

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and it might well be that the representatives appointed on the advice of the Governments of other parts would be prepared, should occasion arise, to undertake similar duties. This is a welcome assertion of the essential interrelation of British subjects and Dominion nationals, and the propriety of the diplomatic representatives of each member acting in a complementary sense, as did the Canadian and British representatives in regard to the case of the *I'm Alone*.<sup>1</sup>

The new rules, therefore, serve merely as suggestions as to what persons a Dominion may properly regard as members of its community when dealing with the right of immigration, the right of deportation, the obligation to accept a deportee from another country, the grant of civil and political rights, diplomatic protection, treaty questions, and extra-territorial legislation. Clearly there may be divergences of view between Dominions on such issues, and it is agreed that, before legislating in such matters, other members of the Commonwealth should be informed and so allowed to present their views. The chief difficulty might be regarding the conditions on which one member wished to treat subjects from another member as becoming its nationals. Obviously the matter would be simple where an application were required from the person concerned, but mere length of residence might not be a just ground if the individual had special reasons for residence, without wishing to change his position. These matters could no doubt be settled easily enough by agreement, as well as the position of those merely resident in a member's territory when nationality was for the first time defined. Incidentally, of course, the whole procedure and substance of the Irish Free State legislation must be regarded as having been condemned by the Conference as inconsistent with the respect due between

<sup>1</sup> See Chapter XVI (2), *post*.

members of the Commonwealth. Of greater practical importance is the fact that General Hertzog was a party to the formal declaration that "it was in no way suggested that any change should be made in the existing position regarding the common status based on the British Nationality and Status of Aliens Act of the United Kingdom, and the corresponding enactments in other parts of the British Commonwealth. This common status is described by the term 'British subject'. The term does not, of course, mean a 'subject of Great Britain'. It is one of long standing as denoting generally all subjects of His Majesty, to whatever part of the British Commonwealth they belong." This statement is of special point because General Hertzog had stated, before leaving for the Conference, that he disliked the general application of the term British subject, and held that it should be confined to the meaning "subject of Great Britain", and intimated that he had had amendments to the British Nationality and Status of Aliens Act of the British Parliament prepared by Dr. Bodenstein for that purpose. It may be assumed, therefore, that it is not proposed at present to repeal the British Nationality in the Union Act of 1926, or to make British subjects aliens in the Union; to do so is unquestionably within the power of Union legislation, though it cannot prevent British or other Dominion legislation from treating Union nationals as British subjects beyond the territorial limits of the Union.

(3) A further matter of the highest importance in its bearing on the character of inter-Imperial relations is the maintenance by the British Parliament of its Imperial authority. This is evidenced by the fact of the enactment of the Statute of Westminster, 1931, which made new law for Canada, the Union of South Africa, and the Irish Free State, and extended the powers of Australia, New Zealand, and

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Newfoundland. As has been noted above, the Union has used the power given to re-enact the Statute. It has also used it to limit the effect of the Statute by providing that the power to enact laws for the Dominions at their request and consent shall not be operative in the Union, but a limitation of this kind is a self-limitation. It prevents any Government from obtaining legislation from the Imperial Parliament and compels it to act through Parliament. It is true that it has been contended that the power to amend the Statute exists, but that view is wholly inconsistent with the plain meaning of the Statute. Moreover, the untenable nature of the contention can be seen at once when it is remembered that, if it were true, the elaborate protection given to the Constitutions of Canada, the Commonwealth of Australia, and New Zealand would be waste paper, and chaos would forthwith arise in the federations from the destruction of their constitutions.

The importance of the legislative supremacy of Parliament, despite the constitutional limitation in the case of the Dominions, which we have now conclusive authority to be a constitutional, not legal, abdication of sovereignty,<sup>1</sup> is that it shows that the unity of the Empire is more than a mere personal union. In that case there could be no question of legislation by the Imperial Parliament having any validity in a Dominion unless it were expressly introduced by Dominion Act. The action of the Union is naturally dictated by the desire to show that in her view the Union is personal, but the Union accepted deliberately the Statute and that negates a purely personal union. The Irish Free State, of course, from the first saw the point involved, and would have preferred to secure a renunciation of authority like that of 1782-3, but it failed to achieve success. So far from agreeing

<sup>1</sup> *British Coal Corp. v. The King*, [1935] A.C. 500, 520.

that Britain could not make law for the State, as was clearly held by Mr. McGilligan, who insisted that Britain was in the position of a foreign country like Italy, the Privy Council has rested on the legislative power of Parliament over the State the setting free of the State from the fetters imposed by the constitution on the activities of the Parliament. So far from treating the Constituent Assembly of 1922 as the source of the legislative power of the Free State, capable of binding Parliament, it has laid down that its sole authority was based on the Imperial Act which created the constitution by giving legal force to the work of the Assembly, and that, since power to alter any Imperial Act was accorded by the Statute of Westminster, all restrictions on the legislative scope of the Irish Parliament are ended, including above all the paramount duty enacted by the Constituent Assembly of respecting the treaty of 1921 as the fundamental basis of the constitution.<sup>1</sup>

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For Canada the paramount power of the British Parliament remains essential, for the constitution can in important matters be amended only by Imperial legislation. The Commonwealth of Australia has constituent power, but only, it is probable, within the limits of a federal constitution, and a fundamental change would require Imperial action. It is significant that, when Western Australia sought to obtain Imperial legislation to enable her to secede from the Commonwealth, the legality of such action was not seriously denied, but only its constitutionality. There is in neither Dominion any real hostility to this supremacy. It has been approved by Mr. Bennett<sup>2</sup> as well as by Mr. Mackenzie King, and defended with skill by the Attorney-General, now Chief Justice, of the Commonwealth. In New

<sup>1</sup> *Moore v. A.G. for I.F.S.*, [1935] A.C. 484.

<sup>2</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, p. 256.

Chapter IV. Zealand and Newfoundland it was never called in question, and for the latter it was used to afford relief in 1933 by enabling the British Government to assume responsibility for bringing the territory back to financial and economic equilibrium. The frank dislike of the Irish Free State, with its resentment at the partition of Ireland, and of the Union of South Africa, with its ingrained republicanism, must be admitted, but the constitution of the Commonwealth cannot reflect the views of the less British units only. In Canada, despite the recent ebullition of strong racial feelings in Quebec, there is no demand on the part of that province for the weakening of the position of the Imperial Parliament in matters affecting the constitution.

There are certain interesting applications of the power of the Imperial Parliament. One of them is the fact that its authority extends by virtue of their British nationality over Dominion nationals in those places wherein the Crown still possesses extra-territorial jurisdiction.

The number of countries where the power is still exercised is steadily diminishing. Turkey freed herself by the Treaty of Lausanne in 1923; Persia by unilateral action in 1928-9;<sup>1</sup> Siam by treaty in 1925; in Egypt agreement exists since 1937 for its eventual disappearance, first by its imminent transfer to the Mixed Courts, and then by the absorption of the latter in twelve years into the judicial system of the country. Iraq likewise and Palestine are free of it. But it survives in China, Kashgar, Maskat, Bahrein, Kuwait, and Morocco, and it was in full force in Ethiopia prior to the Italian aggression. It is found also in use in Tonga and in Zanzibar and the New Hebrides, which are under wider

<sup>1</sup> Parl. Pap. Cmd. 5054 (1937) Its disappearance in French Morocco from January 1, 1938, is provided for in a Convention of July 29, 1937, which, though not signed for the Dominions or India, applies to all British subjects, protected persons, and companies of all parts of the Empire.

control than the foreign countries mentioned. But it is impossible to set up a claim for the Dominions to enjoy such jurisdiction in their own right. No power could be asked to concede such a claim, and the Dominions have no desire to spend money for such ends. The alternative would be for such persons as Dominion nationals to fall solely under local jurisdiction, but this could not be done without British legislation negativing control of them, a course neither desired nor desirable, for British control of subjects in foreign countries in order to be effective must extend to all such subjects.

The supremacy of British law in British courts means that, even though the Free State has attempted to abolish the British nationality of Irish citizens outside the State, the effort is unavailing, for the authority of the State under the Statute of Westminster does not extend to annul Imperial legislation in its operation outside the State but merely in so far as it is a part of the law of the State. This principle is of importance in regard to the suggestion,<sup>1</sup> often taken seriously, that by the declaration of a republic Irish citizens outside the State would become aliens and lose their capacity of holding defence or civil office or exercising the vote. The answer, of course, is simply that the State action would have no result in destroying British nationality in respect of persons not resident in the State, and only by British legislation or the legislation of the Dominions could they lose their status as British subjects. This adds a ground for holding that secession could only be technically perfected by British legislation, very much as relations with the United States had to be regulated by legislation even after the recognition by the Crown of the independence which they had attained.

<sup>1</sup> Keith, *Letters on Current Imperial and International Problems*, 1935-1936, pp. 50-53.

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(4) How far is unity maintained in the action of the King as the head of the executive? The aim of Mr. Cosgrave's Government was to emphasise that the King in Irish affairs acted always solely on Irish advice; Mr. McGilligan was able to assure the Dáil in 1931<sup>1</sup> that the King had never rejected the advice of the Government, and that it was accepted law that in all he did he must act as desired by the Executive Council. The elimination of British action for the State was insisted on in 1928. The counsellors then appointed to act for the King included British ministers, but the State objected to any of them signing and the royal members of the Council alone signed Irish Free State documents. In 1935 the proposed counsellors were royal, and this has been stereotyped in the provisions allowing for appointment of counsellors of State in the Regency Act, 1937. Even so, the Union of South Africa made it clear that it did not propose to adopt the Act, leaving it to be decided when occasion should arise if a regent should be provided for by Union Act. The Free State naturally took no notice of the legislation which, despite obscurity on the part of Sir John Simon, applied automatically to Australia and New Zealand with the dependent Empire and India. An unfortunate gap was left as regards Canada, since no request and consent were made under Section 4 of the Statute of Westminster, and no power exists in Canada to legislate for a regency or the appointment of counsellors of State.<sup>2</sup> The truth is that the full implications of the Statute can only slowly be worked out.

We have seen already that in foreign affairs there was established as early as 1931 by the Free State the principle

<sup>1</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 253, 254.

<sup>2</sup> Keith, *The King, the Constitution, the Empire, and Foreign Affairs, 1936-1937*, pp. 13-21.

of direct access to the King, and in 1934 that doctrine was fully adopted by the Union of South Africa. Every Dominion can follow it, and it is merely a matter of convenience and desire to show solidarity of feeling<sup>1</sup> which induces other Dominions to deal with the Foreign Office. There is no essential unity herein. The more interesting issue is whether there are any matters in which there must be unity. As we have seen in matters of quantity of naval armaments unity was necessary at Washington and at London in 1930, but the Irish Free State and the Union refused to keep in line on qualitative limitation in 1936. Locarno, and the agreement of 1936 with France after its denunciation by Germany, show Britain bound, the Dominions free. The Kellogg Pact of 1928 demanded real unity, and acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice in 1929 was expressed by all units, and that of the General Act of 1928 for the Pacific Settlement of International Disputes was agreed on by the Imperial Conference of 1930, though the Union abstained without wishing to hamper the others in acting. The attitude of the Dominions was conclusive against the acceptance of the Geneva Protocol of 1924<sup>2</sup> so vehemently defended by Lord Parmoor, even had the British Government remained Labour in politics. The Convention of 1930 prepared under League auspices for the provision of financial aid to a power, the victim of unjust aggression, was not accepted by Canada on the score of her objection to anything to give reality to the obligations imposed by the League Covenant, Article 10, though the Commonwealth and the Irish Free State joined the United Kingdom in approval; in fact it never became operative,

<sup>1</sup> So Mr. Mackenzie King in 1924; *J.P.E.* v 331, 506

<sup>2</sup> Parl. Pap. Cmd. 2458; Parmoor, *A Retrospect*, pp. 213-64.

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and in this as in other matters Britain abandoned Ethiopia to her fate. On the other hand, it may be assumed that in all such matters as the regulation of the conduct of war, for instance the banning of the use of gas or the limitation of the employment of submarines, the units of the Empire would keep together, for otherwise it could not be expected that other States would be eager to adopt an arrangement which might be nullified by Dominion action. It is, however, impossible to lay down any principle compelling unanimity, and for this reason, as we have seen, it appears useless to attempt now to treat the whole Empire as ever being a unit of international law. When it appears in this guise, it is merely to be treated as the combined action of the United Kingdom and the Dominions, India occupying the usual anomalous position of acting under British control.

This absence of unity means that now in grievances against a Dominion no recourse lies to the United Kingdom, as it would have lain if Canada had refused reparation for riot damage to Chinese and Japanese at Vancouver in 1907, or if foreigners had been illegally deported from the Union in 1914, as were British subjects of good character. The responsibility now lies with the Dominion alone,<sup>1</sup> a fact brought into clear relief by the form of dealing directly<sup>2</sup> with foreign issues by the Union and Irish Free State. There is no doubt whatever that, if such a dispute should fall within the character of those justiciable under the Statute of the Permanent Court, the case would be dealt with by that Court as between the Dominion and the foreign State. Similarly the League Council or Assembly in

<sup>1</sup> Cf the Imperial Conference, 1937, ruling as to responsibility for multi-lateral treaties, Parl Pap Cmd 5482, p. 27.

<sup>2</sup> See the rather heated exchange of correspondence between General Hertzog and the German minister as to the treatment of Germans in South-West Africa, April 5 and 16, 1937.

the exercise of its conciliatory functions would deal with a dispute between a Dominion and foreign State without involving any British responsibility.

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It must, however, be recognised that, though this principle should be carried to its full logical conclusion if theory were strictly followed, even here the unity of the Empire in the view of foreign powers obtrudes itself. On the theory of complete distinction it would follow that, if a part of the Empire were at variance with a foreign State and the Council dealt with the issue under Article 15 of the Covenant, any part of the Empire other than that engaged in the dispute, which was a member of the Council, would be entitled to vote in arriving at the recommendation of the Council. Such a recommendation if unanimous binds the members of the League not to go to war with any party to the dispute which obeys the recommendation. But as early as 1920, Mr. Rowell<sup>1</sup> for Canada, in agreement with Viscount Grey's view, expressly admitted that in such a case the vote of a part of the Empire could not be counted; referring to a possible dispute between the United States and the United Kingdom, he said: "Canada owes allegiance to the same sovereign as Great Britain, and so long as she continues to do so, she would be a party in the interest and disentitled to a vote. If she disclaimed her interest and claimed the right to vote, she should thereby proclaim her independence." Though these arguments were adduced to meet the objections of the United States to the extra voting power of the British Empire, there is no reason to suppose that the argument would not prevail to-day with foreign powers. This is demonstrated by their attitude to the suggestion that, if a case in which a Dominion was concerned came before the Permanent Court, the Dominion could claim to

<sup>1</sup> Keith, *War Government of the British Dominions*, p. 161.

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have a judge appointed to sit on the Court despite the presence thereupon of a British judge. In theory, clearly, if the dispute is one in which the Dominion alone is claimant or defendant, there should be conceded the right to have its own judge, but the feeling that the British judge must virtually also serve as a Dominion judge is an impression which it is hard to eradicate from the minds of foreign jurists, though no official settlement of the question has yet been possible.<sup>1</sup> It may, however, be doubted if the Empire view would convince the Court. Moreover, from the Empire point of view one point is of importance. If the British member of the Court were reinforced by a Dominion member *pro hac vice*, and the two differed in opinion, there is little doubt that there would be strong feeling in the Dominion against the British judge, a contingency which it is desirable to avoid.

A further issue involving a measure of Imperial solidarity, contested as usual by the Irish Free State, arises from the practice of the United Kingdom in its commercial treaties to stipulate that the foreign power shall give to products from the Dominions most-favoured-nation treatment so long as the Dominions treat products from the foreign country in like manner. It is also usual to include in such treaties clauses permitting the Dominions to adhere to them and to withdraw separately from them. These treaties are signed for the United Kingdom and are not signed for the Dominions in general. It is clear that this mode of action, which is of long standing, implies the right of the Crown on the advice of British ministers not to impose obligations on the Dominions, but to secure for them advantages. Even the Irish Free State has on occasion secured most-favoured-

<sup>1</sup> It was ruled irrelevant during the revision of the Statute despite the claim of Sir C. Hurst and Mr. Elihu Root's support, March 19, 1929.

nation treatment in this way, but the official doctrine there is that in reality the grant of most-favoured-nation treatment was the result of a fresh treaty independent of the British treaty.<sup>1</sup> This attitude is adopted in accordance with the view of Mr. McGilligan that the King, on the advice of British ministers, could no more make treaties for the Free State than could the Mikado of Japan or the King of Italy. This goes beyond the views of the Imperial Conferences, which have indeed stressed the impossibility of any part of the Empire negotiating to impose obligations on other parts, but have never negated the right to secure optional benefits if desired. Strictly speaking, it seems that any part, and not the United Kingdom alone, could, if the foreign State agreed, stipulate for advantages for the rest of the Empire in a treaty signed for that part alone, though in practice it is natural that it is the United Kingdom that normally so acts. The Union<sup>2</sup> also appears to have objections to this procedure, but no formal dissent from it has yet been expressed by the Imperial Conference, and its propriety therefore so far cannot be denied. It is obvious that some at least of the Dominions do not object to this mode of procedure in their interests.

In the same way the British Government in its treaties normally stipulates for advantages for British subjects in general and for British shipping without restriction to shipping registered in the United Kingdom. The Union of South Africa, on the other hand, in its treaty with Germany of 1928 stipulated for advantages to Union registered ship-

<sup>1</sup> So in 1931 quite distinct agreements were made with Brazil. But the treaty with Hayti of April 7, 1932, still stipulates in favour of the Dominions. See Keith, *Journ. Comp. Leg.* xiv. 110, 111; treaty with Siam, Nov. 23, 1937.

<sup>2</sup> Thus in the Russian agreement of April 16, 1930, the Free State and the Union were excluded from the right to adhere and to receive on reciprocity most-favoured-nation treatment; Keith, *Journ. Comp. Leg.* xi. 293, 294.

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ping. Mr. McGilligan again would seem to deprecate this advantage for Irish citizens who are also British nationals, but it seems to be acceptable to the Dominions in general.

In like manner it is the practice still in extradition treaties, such as that of October 15, 1935, with Denmark, to take power to notify for any Dominion its desire to have the operation of the treaty extended to it. Dominion nationals are included in the treaties by which extra-territorial jurisdiction was surrendered in Siam (1925), in Persia (1928), and the Egyptian treaty of August 26, 1936, necessarily affects Dominion nationals,<sup>1</sup> as does the convention of 1937 as to French Morocco.

It is, of course, inevitable that foreign powers should not necessarily be willing to accept the principle that the Dominions should be given privileges for which there is no substantial consideration. The Russian commercial agreement of 1934 gives nothing to ships registered in the Dominions, but it still places all British subjects and British protected persons, including persons belonging to any protected or mandated territory, under most-favoured-nation rights. That and other treaties now emphasise explicitly the fact that, in giving most-favoured-nation treatment, concessions made to the Dominions or other parts of the Empire are not included. The Irish Free State makes the like provision in all its compacts, and it is in accord with a resolution achieved at the Ottawa Conference, 1932. In some ways it is the most striking assertion of unity, for even the Union of South Africa, which in 1928 had deliberately deviated from the practice in the treaty with Germany, in 1932 secured relief from that undertaking.

<sup>1</sup> The convention of May 8, 1937, for the abolition of the capitulations is signed for the Dominions except Canada, which intimated acceptance by letter; Cmd. 5491, p. 71.

The Dominions, naturally enough, in their treaties do not deal with advantages for the United Kingdom. They simply provide special terms for their own nationals and produce, supplementing the general British treaties or, if comprehensive, taking their place. Thus in May 1933 Canada replaced the British treaty of 1882, which the Irish Free State had supplemented in 1931, by two conventions,<sup>1</sup> one as more permanent dealing with the rights of Canadian nationals and French nationals and with shipping registered in Canada and in France, the other touching on trade relations proper.

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It may, therefore, fairly be concluded that a certain amount of unity must be conceded to the Commonwealth, despite the distinct character which also must be recognised as belonging to the parts. It is impossible for the Empire to insist on acting in certain matters as a unity, and also to demand that the parts are to be regarded as absolutely distinct. Foreign powers cannot be expected to concede any such claim, nor do the Dominions other than the Union and the Free State manifest any real desire to establish it.

(5) The element of unity, however, appears most clearly in the case of the relations *inter se* of the parts of the Empire. It is clear that in the view of the British Government, which succeeded in securing virtual homologation of its opinion by the Imperial Conference of 1926, these relations are not relations governed by international law, but are constitutional in character. In the case of a mere personal union of two countries each having the same King, there is no ground on which the possibility of regulating these relations by international law could be denied. In fact the case of Hanover proves definitely the contrary; as we have seen, the neutrality of Hanover could be declared in a British

<sup>1</sup> For the Acts giving them the force of law see 23 & 24 Geo. V. c. 30, 31. For the Polish treaty of 1935 see 25 & 26 Geo. V. c. 51.

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war just as that of the United Kingdom in a Hanoverian war. Agreements between the King of the United Kingdom in that capacity and in his capacity as King of Hanover could therefore only be regarded as treaties of international law, despite suggestions by Sir S. Cripps<sup>1</sup> to the contrary. This view of the position was naturally taken by the Irish Free State, and its entry into the League of Nations gave it the opportunity to press its view. Article 18 of the League Covenant requires the registration of treaties or international engagements entered into by members of the League with the Secretariat, and lays down that no such treaty or engagement shall be binding until registration. The British Government never regarded the Treaty of 1921 with the Free State as falling under this Article and did not register it. On July 11, 1924, the representative at Geneva of the Free State registered the treaty of 1921, evoking from the British Government the formal assertion that "since the Covenant of the League of Nations came into force His Majesty's Government has consistently taken the view that neither it nor any conventions concluded under the auspices of the League are intended to govern relations *inter se* of various parts of the British Commonwealth". The Irish Free State rejoined, denying the validity of the British contention, but without adducing reasons,<sup>2</sup> and the Imperial Conference of 1926 took up the matter in connection with the question whether general treaties concluded under League auspices applied to the relations *inter se* of parts of the Commonwealth. In fact it had been felt necessary in certain cases, the treaties being concluded between States by name, to provide expressly in the treaty that it was not

<sup>1</sup> June 17, 1932, 259 H.C. Deb. 5 s 695.

<sup>2</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 347, 348.

to apply between parts of a State under one sovereign. It was now agreed that treaties should be concluded in the name of the King as the symbol of the special relationship between the different parts of the Empire.<sup>1</sup> "The making of the treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been signed in the name of the King. In this connection it must be borne in mind that the question was discussed at the Arms Traffic Conference in 1925, and that the legal committee of that Conference laid it down that the principle to which the foregoing sentence gives expression underlies all international conventions."<sup>2</sup> Now it is true that this interpretation of the discussions at the Arms Traffic Convention may be incorrect, for the doctrine there enunciated may merely mean that the terms of a convention have no application as between the various territories of a member of the League, *i.e.* between the United Kingdom and the Crown Colonies and Protectorates; but that is irrelevant, for the Conference of 1926 accepted unanimously, and no Dominion Parliament dissented from, the view that relations of the parts of the Commonwealth *inter se* are not relations of international law. No doubt the Free State later repented of its admissions at the Conference of 1926 and it took the opportunity to raise the issue indirectly in connection with the signature of the Optional Clause of the Statute of the Permanent Court of International Justice in 1929.<sup>2</sup> The British and the other

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<sup>1</sup> Keith, *Speeches and Documents*, p. 382.

<sup>2</sup> *Ibid.* p. 414. In 1929 Mr. McGilligan admitted that the Kellogg Pact could not be deemed to apply between the parts of the Empire.

Chapter IV. Dominion Governments accepted that clause which renders reference to the Court compulsory in certain circumstances with the express exclusion of disputes with the Government of any other member of the League which is a member of the British Commonwealth of Nations, "all of which disputes shall be settled in such manner as the parties have agreed or shall agree". The Irish Free State acceptance was absolute on the sole condition of reciprocity, and it was energetically denied that the British reservation was valid within the terms of the Statute, and the claim was made that the Irish Government would be able in any case under the Statute with the British Government to apply to the Court in defiance of the British reservation. It is clear that the claim was untenable, for, whether or not the rules of international law could be invoked as applicable to inter-Imperial relations, the British reservation could not be overridden by the Court. A like divergence of view was expressed by the British and Irish Governments regarding the acceptance of obligations to arbitrate under the General Act of 1928 for the Pacific Settlement of International Disputes. It must be added that in the case of the Optional Clause the Union Government expressed the view, not that the Permanent Court could not deal with inter-Imperial disputes, but that it was preferable that resort should not be had to it for that purpose.

The British view must under all the circumstances be held to be binding, and with it fall to the ground many complex and delicate issues. Had the terms of the Covenant applied as between the members of the Commonwealth, it would have been possible to argue that secession was forbidden by Article 10, which compels all members of the League to preserve the territorial integrity and existing political independence of members of the League. Delicate issues would

also arise in the case of disputes in which any member of the Commonwealth was engaged and fell under League disapproval, so that, for instance, the Council required action against the defaulting member under Article 16 of the Covenant, and so forth. Consideration of the gravity of the inconvenience of holding that the Covenant applies between the members of the Commonwealth *inter se* doubtless outweighs the arguments which might be based on the mere wording of the Covenant. The Dominions on the whole have not pressed the point, partly, no doubt, because they do not contemplate with any satisfaction the possibility of finding the issue of immigration and treatment of immigrants made an international question as between them and India, also a member of the League. It is true that immigration has so far been held to be a matter of domestic jurisdiction in which the League or the Court is unable to interfere, but it is also clear that international law is not static, and that there is no certainty that the classification of immigration in this manner will permanently endure.<sup>1</sup> Not less important<sup>2</sup> is the issue of inter-Imperial preferences such as those agreed on at Ottawa, for, if relations between the Dominions and the United Kingdom were international, foreign States could demand the advantage of them under most-favoured-nation clauses in treaties.

(6) The same determination of the parts of the Commonwealth to secure elimination of foreign intervention in any shape is seen in the decision of the Conference of 1930 as to inter-Imperial arbitration. It is a signal fact that, while compulsory arbitration of disputes with foreign States had been undertaken by the whole Empire in 1929, it proved impossible to secure agreement to any compulsion or even

<sup>1</sup> Wheaton, *International Law* (ed. Keith), I. 574.

<sup>2</sup> See below, Chapter XXI (6).

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The unsatisfactory character of the agreement of 1930 was revealed at once when the question was raised in 1932 of the right of the Irish Free State without the assent of the British Government to eliminate from the constitution the oath imposed under the treaty of 1921 on members of the

legislature, and to withhold payments of certain land annuities, pensions to members of the Royal Irish Constabulary, former Civil servants, etc. When the British Government finally made it clear that it was prepared to arbitrate on the lines of 1930, it was met by the absolute refusal of Mr. De Valera to accept arbitration unless a foreign element was permissible<sup>1</sup>. There was a minor issue as to the scope of the arbitration, namely the number of payments to which it might extend, and at one time the British Government seems to have proposed to limit arbitration to the annuities. But ultimately it appears the offer of that Government was to accept any tribunal so long as it was an Empire tribunal, even if it did not comply precisely with the principles laid down in 1930. The refusal of Mr. De Valera, therefore, was based on this aspect essentially, and may be regarded as a revival of the claim of 1924 that the relations between the Free State and the United Kingdom are relations of international law, and therefore suitable for reference to a tribunal whose members may include foreigners. The British insistence on refusing this proposal rests in turn on the belief that it is vital to maintain the doctrine that the relations of the parts of the Commonwealth *inter se* are not relations of international law, since otherwise the Ottawa Conference agreements for trade preferences would be rendered nugatory by the operation of most-favoured-nation treaties.

The chances of the necessity of authoritative settlements of inter-Imperial disputes is naturally increased by the prospects of trade arrangements between parts of the

<sup>1</sup> Mr. J. H. Thomas, House of Commons, June 17, 1932. On the refusal of the State to accept an Empire tribunal, and the withholding of payments, British duties were imposed on Irish Free State imports, and were met with retaliatory duties, and the creation of an emergency fund of £2,000,000 to foster Irish industry and wheat-growing to create an economically independent State.

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Empire already achieved and contemplated. It is clear, though the proposal was not accepted at Ottawa, that the insertion in future arrangements of an agreement to refer differences to an inter-Imperial tribunal would be a convenient and wise step, and would follow the analogy of treaties between States which often provide for reference to the Permanent Court or other tribunal of differences which arise. It is clear that in practice inter-Imperial disputes must be determined on much the same principles as apply to international disputes, for these, after all, rest in the main on the law of contract, and for other issues, such as the treatment of residents, the analogies of international relations<sup>1</sup> would have to be resorted to, the tribunal making such changes as are held by it necessary to adapt the rules prevailing between States under different sovereigns to States owing allegiance to the same sovereign.

In certain cases, of course, the tribunal would be able to apply the ordinary rules of international law without qualification. Though normally international treaties are, under the ruling of 1926, not to apply to the relations *inter se* of parts of the Commonwealth, on occasion they may deliberately be made so applicable, as is now proposed to be the case with the Convention as to Air Navigation,<sup>2</sup> and, when this is done, whatever the form adopted, the tribunal would naturally treat the issue as if the parts of the Empire were distinct States.

The complications as to choice of law may be illustrated

<sup>1</sup> Baty, *Journ. Comp. Leg.* xii. 163, holds that inter-Imperial relations are subject to international law; cf. Rynne, *Die völkerrechtliche Stellung Irlands*, pp. 342 ff. Sir S. Cripps' denial (267 H.C. Deb. 5 s. 667) that one sovereign can enter into relations with himself goes too far, the Elector of Hanover could clearly make a treaty with the King of the United Kingdom.

<sup>2</sup> The Protocol of December 11, 1929, gives each Dominion a distinct vote, in lieu of giving one vote to the whole Empire, on the understanding that the Convention applies between the parts of the Empire.

from the Irish annuities dispute.<sup>1</sup> One argument raised by Mr. De Valera stressed a point which is essentially an issue of constitutional law, namely the rule that the executive has no power to bind the Crown in a pecuniary matter without confirmation by Parliament. This principle which is generally sound, though not without difficulties, was adduced to deny the validity of an accord made by way of final settlement of liabilities, which ought, it was held, to have been dealt with as other accords had been, and to have been approved by both the British and the Irish Parliaments. On the other hand, the British Government, while insisting on a domestic tribunal, sought to maintain the doctrine that certain types of accords such as the chief one in question do not need any form of formal approval, but come into operation forthwith. Clearly there was a conflict of principles very difficult of settlement, but neither international law nor constitutional law could be deemed conclusive.

(7) Efforts to reduce the relations of the Dominions and the United Kingdom to some recognised norm are naturally often and quite legitimately attempted, but without any very great achievement of accord.

When the Dominions became members of the League of Nations it was not unreasonable to apply the analogy of those confederations which are sufficiently loosely knit to allow the units to exercise to some limited extent the power of receiving envoys and making treaties, though without authority to make war or peace or declare neutrality. On this basis it was possible to regard the Empire as still a unit. It would then be a form of *Staatenbund*,<sup>2</sup> not precisely

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 116 f., 126 f., 131-3; Harrison, *Ireland and the British Empire*, pp. 254 ff.

<sup>2</sup> Hatschek, *Volkerrecht*, p. 41; Berber, *Die Rechtsbeziehungen der Britischen Dominions zum Mutterland* (1929), p. 99; Baty, *Journ. Comp. Leg.* xi. 163.

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like any other, but of that generic type. For the reasons above indicated it is hardly possible to take this point of view. While as late as the Treaty of Lausanne it was possible for the King, on the advice of the British Government without Dominion co-operation, to conclude a treaty to end a war, at the present day Dominion co-operation would be essential, and action without assent would be unconstitutional. Of course, it might happen that Britain was compelled so to act, leaving the juristic consequences to be guessed at, but the fact that it would be unconstitutional renders it necessary not to accept the theory of a confederation capable of being still treated as a unit at international law. Most of the writers who have held this view were probably justified by the state of affairs existing when they wrote, and their view might well be different if the issue were now before them. One point of importance is that there is lacking the usual distinctive mark of a confederation, a system of agreements between the members which were, when made, treaties between sovereign or semi-sovereign States, and therefore of international character. The prevailing view, as we have seen, is still that inter-Imperial relations are not those of international law.

This last point tells also against those who call the Empire an association of States or a Britannic alliance or a League of Sovereign States of British race.<sup>1</sup> There is lacking that definite accord which it is reasonable to demand from an alliance of any sort. The obligations of the parts of the Empire *inter se* have never been definitely formulated. All the Imperial Conferences have given out resolutions on defence conspicuous for the absolute lack of the undertaking of any obligation by any unit of the Empire to assist the United Kingdom, or any other unit, in any defined cir-

<sup>1</sup> Löwenstein, *Archiv des öffentlichen Rechts*, xi. 255 ff.

circumstances. No remarks of Australian Prime Ministers or peripatetic peers have moved Canada to acknowledge responsibility of any kind for any defence save her own. The position was perfectly plainly stated again in 1937 with the fullest approval of Parliament, and the fact must be taken as certain. Hence there is lacking any effective analogy to a real alliance.<sup>1</sup> The relationship is wholly unlike that of a unified State; it is much less formal than that of a confederation, and much too nebulous to be styled an alliance.

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It remains, therefore, to consider whether it can happily be called a personal union, as is the view taken by Professor Smiddy,<sup>2</sup> and naturally often held by others. But the essence of a personal union is that it depends merely on the accident of two countries possessing one and the same head. The Empire has more cohesion than mere subjection to a single King, whose powers are exercised on the authority of the several Governments with no bond between them. There is a common allegiance<sup>3</sup> which makes the subjects in one unity in close relations with those in another, which gives them a common status, and thus forms a definite bond between peoples of various races, religions, colours, and temperaments. There is further the established tradition of free co-operation and consultation on foreign affairs,<sup>4</sup> and on domestic issues. These are laid down in the institution of the Imperial Conference and in its resolutions, and, free as

<sup>1</sup> Neither Canada nor the Union of South Africa is regularly represented at meetings of the Imperial Defence Committee.

<sup>2</sup> *Great Britain and the Dominions*, p. 115; M. Rynne, *Die volkerrechtliche Stellung Irlands* (1930); Ewart, *Can Bar Review*, x. 121; Schlosberg, *The King's Republics* (1927). Cf. Baty, *Journ Comp. Leg.* xviii. 202.

<sup>3</sup> *Great Britain and the Dominions*, p. 54. On the other hand, to talk of a real union is not helpful, *Handbuch des Volkerrechts*, II. 4, 817; Heck, *Der Aufbau des britischen Rechtes* (1927), p. 17.

<sup>4</sup> In special, of course, the British readiness to protect all British subjects in any country, asserted at the Imperial Conference of 1937; Cmd. 5482, p. 25.

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is the co-operation, as regards what is agreed to, the duty exists and is recognised by all the ministries of the Empire. Perhaps the British Government as the most powerful has the most lively sense of the duty of co-operation, yet no Dominion Government—the Irish Free State perhaps excepted—would venture to declare itself finally determined not to share in the counsels of the Empire as a definite practice. The force of the tradition of co-operation is well seen in the confused and uncertain replies returned at first by Mr. De Valera to enquiries about the representation of the Free State at the Imperial Conference of 1937, when assertions that presence there would do no good—his final attitude—were combined with assurances that the Free State would gladly take advantage of anything which might be obtained of profit from the meeting. The fact is that the cohesion of the Empire, such as it is, rests on sentiments and on conventions, and this fact renders it practically impossible to fit it into any of the established classes.<sup>1</sup> The cohesion moreover differs very much as regards the several units. That of New Zealand is of the closest type; Australia on the whole appreciates the essential character of the connection which assures her the possibility of peaceful development, Canada has divided interests and loyalties, partly from the racial question, partly from her deep concern with the United States; while racial feeling and history render the connection of the Union and still more of the Irish Free State more of an external character.

The new form of the Coronation Oath of May 12, 1937, though adopted without Parliamentary sanction and in view

<sup>1</sup> See also H. Walter, *Die Stellung der Dominien im Verfassungssystem der Britischen Reiches im Jahre 1931*, pp. 98, 99, F. Apelt, *Das Britische Reich als volkerrechtsverbundene Staatengemeinschaft* (1934), whose doctrine is expressively summed up in the title, Otto W. A. Hoops, *Der Status der Sudafrikanischen Union* (1937), who accepts complete sovereignty and the right of secession.

of the terms of the Act of Settlement, 1701, of dubious legal validity,<sup>1</sup> presents the Crown as essentially a unity in multiplicity. "The peoples of Great Britain, Ireland, Canada, Australia, New Zealand, and the Union of South Africa, of your Possessions and the other territories to any of them belonging or pertaining, and of your Empire of India" the King swore to govern, "according to their respective laws and customs". Moreover he swore but one oath, administered by the Archbishop of Canterbury, and the Union of South Africa, which alone legislated on the topic and originally desired a separate oath, agreed to accept the single oath, when it found that the British Government and those of the Dominions were unwilling to accept several oaths. If, therefore, we agree with the Imperial Conference of 1937 that the oath mirrors the structure of this group of free, equal, and autonomous States known as the British Commonwealth of Nations, we must admit that it is still a group, not a fortuitous congeries of separate atoms.

(8) In municipal law the issue of the divisibility of the Crown has been considered at various times, especially in regard to the division of powers in the federations. Thus in *Municipal Council of Sydney v. The Commonwealth*<sup>2</sup> the view was taken that the Crown in the Commonwealth and in the States might be regarded as distinct juristic persons. Or again, the view might be taken that the several Governments were distinct agents of the King for Commonwealth or State purposes.<sup>3</sup> The High Court in the *Engineers' Case*<sup>4</sup> disapproved this distinction between the Imperial King, the

<sup>1</sup> Parl. Pap. Cmd. 5482, pp. 9, 10. For the illegality of the changes without Parliamentary sanction see Keith, *The King, the Constitution, the Empire, and Foreign Affairs, 1936-1937*, pp. 21-31. For the Coronation Oath Act, 1937, of the Union, see *J P E*, 1937, pp. 418 ff.

<sup>2</sup> (1804) 1 C.L.R. 208, 231, *R. v. Sutton* (1908), 5 C.L.R. 789, 797, 804, 817.

<sup>3</sup> *R. v. Sutton*, per HIGGINS, J. at p. 816. <sup>4</sup> (1920) 28 C.L.R. 129, 152.

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IV. Commonwealth King, and the State King, and the doctrine based thereon that the King in the relative Parliament could bind himself in that aspect only, and insisted on the primary legal axiom that the King is ubiquitous and indivisible in the King's Dominions. "Though the Crown is one and indivisible throughout the Empire, its legislative executive, and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality, in accordance with the common law, or the statute law there binding the Crown." But the indivisibility is essentially real, and hence the courts have ruled that, if there is nothing in positive law to intervene, the rights of the Crown in respect of actions taking place in a colony can be enforced in England.<sup>1</sup> Thus colonial Governments were ruled under the existing law there to be entitled to priority in claims in the liquidation of a corporate body, and in like manner in *Williams v. Howarth*<sup>2</sup> a colonial Government, which has entered into a contract with a soldier, may set off against its liability thereunder payments made by the Imperial Government. The principle has been clearly set out by the Privy Council in a Canadian case of competing priorities,<sup>3</sup> the federation law giving payments on account of excise a preferential ranking, while Quebec legislation gave priority to unpaid taxes. The Privy Council pointed out that it was true that there was only one Crown, but that by legislation, assented to by the Crown, as regards Crown revenues and Crown property there was a distinction made between the revenues and property in the two cases, and it stated that by its legislative power the federation might have given its claim in respect of excise absolute priority.

<sup>1</sup> *Oriental Bank Corp., In re*, 24 Ch. D. 643.

<sup>2</sup> [1905] A.C. 551.

<sup>3</sup> *Silver Bros. Ltd., In re*, [1932] A.C. 514.

The indivisibility of the Crown, therefore, means that there can be no doctrine, as once held in Australia, that a State Parliament's legislation must be deemed to apply only to the Crown in the State,<sup>1</sup> and analogously in the case of Commonwealth legislation. A State Act can bind the Commonwealth,<sup>2</sup> even if the Commonwealth by due legislation on the topic might confer immunity on its instrumentalities, and, on the other hand, the Crown in the Commonwealth can take advantage of the fact that State law does not bind the Crown's right of priority as regards the winding up of companies.<sup>3</sup>

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No serious objection to the indivisibility of the Crown can be derived from the form of procedure adopted under the Commonwealth Constitution, Section 75, which permits suits between States or between the Commonwealth and a State. The natural mode of looking at that provision is to take it as a matter of procedure, providing for a convenient mode in which the constitutional rights laid down in the federal constitution can be ascertained and declared. It is quite unnecessary to accept the view that the procedure implies that the States are corporations or international persons,<sup>4</sup> or that the suits are between the Crown as representing one part and the Crown as representing another part. The judgments in such cases are essentially declarations of constitutional right. They cannot operate to appropriate State revenues; they merely impose a moral obligation to give them effect.<sup>5</sup> Moreover, so far from the people in the part affected being interested in the success

<sup>1</sup> Cf. *Roberts v. Ahern* (1903), 1 C.L.R. 406.

<sup>2</sup> *Pirrie v. McFarlane* (1925), 36 C.L.R. 170.

<sup>3</sup> *Keep McPherson Ltd., In re*, (1931), 48 W.N. (N.S.W.) 180.

<sup>4</sup> *Baty, Journ. Comp. Leg.* xii 157

<sup>5</sup> See Wynes, *Legislative and Executive Powers in Australia*, pp. 343, 344, citing the *Australian Railways Union Case* (1930), 44 C.L.R. 319.

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of the cause put forward by the Government, they may hold diametrically opposed views, a fact which emphasises the procedural aspect of the whole provision as opposed to any theory of the Crown as representing different groups of its peoples in litigation *inter se*.

PART II  
THE GOVERNMENT OF THE DOMINIONS



## CHAPTER V

### THE SOURCES OF DOMINION CONSTITUTIONAL LAW

UNDER this head we have to consider (1) the statute law Chapter  
and the prerogative as the basis of the Dominion con- V.  
stitutions; (2) the conventions which give life to these con-  
stitutions, and (3) the mode of constitutional change when  
conventions are insufficient to bring harmony into the work-  
ing of the State.

The title Dominion owes its origin to the Colonial Conference of 1907, when it was chosen as a means of distinguishing the parts of the Empire enjoying responsible government from the dependent Empire. It then denoted the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, Newfoundland, and the South African colonies which in 1909 formed themselves into the Union of South Africa. In 1921-2 the Irish Free State was added to the list, ranking in official precedence before Newfoundland, the least populous of the Dominions. Of these Dominions there are two federations, Canada and the Commonwealth, the Union of South Africa is a unitary State whose constitution makes some slight concession to federal sentiment; the other Dominions are purely unitary States. The Canadian provinces and the Australian States enjoy responsible government within the federal limits, and the principles applicable to the Dominions in general normally apply to them also, whether in the sphere of executive government or legislation or judicature.

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The Dominions, of course, are parts of the British Empire,<sup>1</sup> and according to the terminology of the Imperial Conference of 1926 Great Britain and the Dominions as autonomous units may be regarded as forming within the Empire the group known as the British Commonwealth of Nations. That term emphasises the existence of a number of parts of the Empire which have equality of status, and has a certain convenience. But it must be remembered that Great Britain is not a term of art; the real unit is the United Kingdom of Great Britain and Northern Ireland as determined by the Royal Proclamation of 1927 under the Royal and Parliamentary Titles Act, 1927. Moreover, the United Kingdom is an Imperial power, and exercises final control over a vast area. Thus, when the Statute of Westminster, 1931, contemplates legislation by the United Kingdom as part of the mode of changing the succession to the throne, it expects that the United Kingdom shall legislate for the whole of the dependent Empire, for the change must affect the whole of the Empire and not the self-governing parts alone. It is necessary, therefore, on occasion to accept the identity of the Empire and the Commonwealth as is the case in the Irish Constitution,<sup>2</sup> and in the Commonwealth agreement of 1931 as to Merchant Shipping. For practical purposes the importance is slight, but it is necessary to guard against the assumption of Mr. J. H.

<sup>1</sup> They are technically colonies as defined in the Interpretation Act, 1889, subject to the fact that for certain purposes powers of Colonial Governors must be deemed to apply to Governors of the States of Australia, not of the Commonwealth. Under the Statute of Westminster, 1931, the term "colony" will not in future Acts include Dominions, States, or provinces. They are technically British possessions and part of the British dominions (the double use of the term is inconvenient). But already in the Colonial Stock Act, 1934 (24 & 25 Geo. V. c. 47) the term "colonial" has had to be used, though the Act was passed for the sake of the Union of South Africa.

<sup>2</sup> Art. 1, as compared with Art. 1 of the treaty of 1921.

Thomas that the United Kingdom is a Dominion, or that of Sir Thomas Inskip that the Commonwealth includes only the Dominions, without the United Kingdom. Even apart from the Dominions the United Kingdom has Imperial rank in international law; that England is an Empire was asserted by Henry VIII.,<sup>1</sup> and since then the Crown has always been Imperial. No excuse, therefore, is necessary, as Mr. Latham has observed, for the use of the term Imperial Government or Parliament.

(1) A fundamental distinction is drawn in the common law of England<sup>2</sup> between the legal position of colonies acquired by settlement and those obtained by conquest or cession. The rights of Englishmen, it was held, must accompany them when they fared to settle overseas, but otherwise when the case was one of a conquered or ceded colony. When settlements were made by Englishmen among savage peoples or in empty lands, the common law of England and such statutes as might be held to be of general character must be applied to their legal relations; they could not evade the sovereignty of the Crown by absence abroad, but equally the Crown could have no greater power over them than if they had been in England, nor would settlers be induced to go abroad if they were not promised such rights. On the other hand, if territory under a civilised system of law were conquered or ceded, then it would be monstrous that such law should be abrogated automatically by conquest. Yet conquest gave the King absolute power over the conquered, subject to the moral restraint of the terms of cession and the international right of the ceding power to claim their observance. What the King pleased to order then was law,

<sup>1</sup> Keith, *The King and the Imperial Crown*, pp. 14, 15.

<sup>2</sup> Keith, *Constitutional History of the First British Empire*, chap. i.; *Dutton v. Howell* (1693), Show. Parl. Cas. 24; *Blankard v. Gally* (1693), 2 Salk. 411.

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and, if the English settled in such colonies, they must acquiesce in falling under the system continued or altered by the King. Applied to the form of government the principles yielded two clear doctrines. (1) In the case of a settled colony the royal prerogative extended only to the creation of a constitution analogous as far as practicable to that of the mother country. Legislation and taxation, therefore, could only be passed by the aid of a legislature of which one-half at least was elective. (2) In the case of a conquered or ceded colony the King might lay down by his own authority such form of government as he thought fit, and the legislative and taxing power could be exercised by him without the assent of a representative legislature. But by a vital addition it was held (3) that the grant to a conquered or ceded colony of such a legislature deprived the King of his legislative and taxing power, unless in the instrument of grant he had specifically reserved such power. Hence it was ruled by Lord Mansfield, that through inadvertence in creating first representative government in 1764 in Grenada and then imposing an export tax the King had mismanaged his powers,<sup>1</sup> so that the tax was invalid and the King could not raise it unless he could persuade the legislature to concur.

Applying the doctrine of settled or conquered or ceded colonies to the Dominions, it is clear that Australia and perhaps New Zealand<sup>2</sup> stand on the basis of settlement, and that, despite its chequered history, Newfoundland can claim like rank. In the case of Canada, the maritime provinces originally were settled, then ceded to France, but restored; the area once in the hands of the Hudson's Bay

<sup>1</sup> *Campbell v. Hall* (1774), 20 St. Tr. 239. See Keith, *Journ. Comp. Leg.* xiii. 126, 127; xiv. 118; *Abeysekera v. Jayatilake*, [1932] A.C. 260.

<sup>2</sup> Official opinion accepted both settlement and cession as the bases of tenure; for cession see T. Lindsay Buick, *The Treaty of Waitangi* (1936).

Company, the western provinces, and the lands recently discovered in the extreme north may be deemed settled, but the old Quebec area was acquired by cession. In South Africa the Cape was ceded, the Transvaal and the Orange Free State conquered, and Natal might be reckoned a colony by conquest or cession. The Irish Free State stands in a category by itself, unaffected by a distinction based on colonial conditions. But it must be admitted that the idea of settlement is vague, and in a sense New Zealand was acquired by the cession of authority of the native chiefs by the Treaty of Waitangi in 1840; though such a cession cannot be fully equated with a cession by a recognised state of international law, it was treated as such by the Crown.

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On the principles laid down, as applied to these areas, it might have been expected that wide use of the prerogative would have been made, and that the constitutions would largely rest upon it. But in fact, save in the case of Newfoundland, the prerogative has been found inadequate, and the constitutions of all the other Dominions, States, and provinces rest upon statute. Newfoundland itself was for a considerable time subject to statutory enactments, which aimed at treating the island as a mere fishing base and denied it regular civil institutions. These, however, were swept away in 1832 in order to permit of regular government, and a representative legislature was conceded. In 1855 responsible government was conceded, and rested on letters patent of 1876. These were suspended in 1934 under the authority of the Newfoundland Act, 1933.

In the case of Quebec the right to control by the prerogative was sacrificed by the Royal Proclamation of 1763, promising the grant of an Assembly, and, when it was decided to undo this promise with its accompanying assurance of the substitution of English for French law, Parlia-

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ment had to intervene and to pass the Quebec Act, 1774. Further change could be effected only by the same means; the Constitutional Act, 1791, divided Quebec into Lower and Upper Canada, while the Act of 1840 reunited them. The maritime provinces, Nova Scotia, New Brunswick separated from it in 1784, and Prince Edward Island, were granted representative government by the prerogative; but when in 1867 federation was decided upon, an Imperial Act was necessary. Apart from the difficulty of concurrent legislation, it was clear that even thus no federation could be achieved, for no province could legislate to have effect outside its own area or to set up institutions with powers far exceeding its own mandate. The federation itself created, under powers granted by Imperial Acts of 1868 and 1871, the new provinces, Manitoba in 1870, and Saskatchewan and Alberta in 1905, out of lands once administered by the Hudson's Bay Company. In the west Vancouver Island enjoyed from 1856 to 1866 representative government under the prerogative; it was then merged under Imperial Act with British Columbia, which had been given a restricted form of administration by Imperial Act in 1858; the united province became in 1871 part of the federation.

Australia was first chosen to be a penal colony; hence its administration was wholly autocratic, and in many respects illegal.<sup>1</sup> But settlement was unavoidable; by 1819 it was realised that to legislate without a representative body was impossible, and, as such a body could not wisely be created, Parliament in 1823 provided for Crown Colony rule. This intervention was necessarily followed by further Acts,

<sup>1</sup> This was early recognised by Bentham, *Works*, iv. 260; the civil courts erected under letters patent of April 7, 1787 and Feb. 4, 1814, made no provision for civil juries, contrary to English law; Webb, *Imperial Laws in Force in Victoria*, p. 123. The absence of a criminal jury was sanctioned by Order in Council under 27 Geo. III. c. 2.

especially those of 1842 and 1850; under the latter New South Wales, Tasmania, and Victoria were enabled to frame constitutions; of these the first and last were confirmed with alterations by Imperial Acts of 1855; the second received sanction for its local Act in the same year. In 1859, under Imperial Act, Queensland was created by Order in Council with responsible government. South Australia, which had never been like these colonies an integral part of New South Wales, was created by Imperial legislation of 1834; it obtained responsible government under a local Act of 1855–6, while Western Australia, first created by Imperial Act of 1829, was finally given responsible government by Imperial Act of 1890. Federation of the six colonies was effected in 1901 by Imperial Act.

New Zealand at first, from 1840, was treated as part of New South Wales, but a series of Imperial Acts resulted in 1852 in the grant of representative government, which in 1855–6 was transformed into responsible government. The native question was one of the causes why at first representative institutions were withheld and therefore recourse was had to Imperial legislation.

In the case of South Africa the prerogative to provide constitutions for ceded colonies enabled the Crown to provide for the government of the Cape, ceded in 1814, and Natal, made a distinct colony in 1845. Representative government was accorded to the former by local Ordinance authorised by Order in Council in 1853, to the latter by an Imperial Charter of Justice in 1856. Responsible government was created by local Acts of 1872 and 1893. On the conquered colonies of the Transvaal and the Orange River, after a period of complete control, responsible government was conferred in 1906–7 under the prerogative. So far Parliament had not been required to intervene, but the

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— need of federation evoked the Union of South Africa by an Act of 1909.

The Irish Free State, on the other hand, was created as the result of an agreement styled Articles for a Treaty of December 6, 1921, between the British Government and a body acting as the Government of Ireland, but without any actual legal status. The treaty was approved by Parliament and by a meeting of the members elected to the lower house of Southern Ireland provided for by the Government of Ireland Act, 1920, which as a whole had been rejected by the rebels. Moreover, a constitution was framed by this body which stands as the Constitution of the Free State, and which was also approved by an Imperial Act. While, however, in the case of the Dominions it has been frankly conceded that the constitutions rest without exception on the basis of Imperial Acts, the Irish view has always been that the constitution was valid apart from the Imperial Act, on the ground that all power in Ireland came from the people of Ireland, and not from any British grant, a doctrine not naturally accepted in the United Kingdom, and in 1935 formally repudiated by the Privy Council.<sup>1</sup>

In all these cases save that of the federation of Canada, the power granted to the Parliaments includes a measure of power to make constitutional changes. This power has been freely exercised, and the constitutions rest therefore on the basis of Imperial Acts freely amended in detail and often even in matters of high importance, such as the constitution of the legislature and the relations of the two houses.

While the doctrine regarding the power of legislation in settled colonies necessitated, as has been seen, Parliamentary

<sup>1</sup> *Moore v. A.-G. for Irish Free State*, [1935] A.C. 484. Contrast *Cahill v. A.-G.*, [1925], 1 I.R. 70; *Lynham v. Butler* (No. 2), [1933] I.R. 74, 94-5; *State (Ryan) v. Lennon*, [1935] I.R. 170, 203, 225.

intervention to modify its operation, it was always held that in matters of executive concern the prerogative was adequate to provide for the conduct of government. In fact the Imperial Acts and the earlier Acts of the colonies were specially framed to avoid interfering with the exercise of the prerogative. The creation of the federations and the Union, however, raised doubts as to the power of the Crown to create executives by the prerogative for these artificial aggregations. The doubt seems unfounded, but the Acts all provide for the constitution of the executive, and in other cases from time to time provisions on this head have been inserted in local Acts. Yet in the great majority of instances the office of Governor is still the creation of the prerogative letters patent, and similar letters patent have been issued for the federations and the Union, though the office of Governor-General there rests on statute. The relation between prerogative and statute is now clear. Statute can regulate prerogative, and, if a field is fully covered by statute,<sup>1</sup> prerogative will be assumed to be superseded, but if this is not the case, prerogative may be relied upon and, even when there is statutory authority, prerogative may supplement it.

The character of the prerogative does not substantially vary in the Dominions. It is true that the common law of the Union is Roman Dutch law and in Quebec the old French law, but the prerogatives of the Crown are based on English common law, and as such were introduced on the acquisition of these territories, superseding, in so far as they were inconsistent, the former law. It is clear that it would be impossible for the British Crown to accept by conquest prerogatives inconsistent with the principles of English law.

<sup>1</sup> *A.-G. v. De Keyser's Royal Hotel*, [1920] A.C. 508, *R. v. Bradley* (1935), 54 C.L.R. 12; Keith, *Journ. Comp. Leg.* xix. 116.

**Chapter V.** This rule, however, applies in strictness only to the essential political prerogatives.<sup>1</sup> The English prerogative inevitably includes certain minor matters which may be negatived in their application to territories under a different system of legislation. This consideration, however, is of minimal importance in its application to the Dominions. But, when powers of government exist under local law which are not inconsistent with the British prerogative, they can be exercised on behalf of the Crown.

The extent of the prerogative rights effective in the Dominions is very large. The Crown enjoys exemption from criminal or civil liability save in so far as it has been waived by statute.<sup>2</sup> All land is vested in it as ultimate owner, and all waste land is its absolute property;<sup>3</sup> gold and silver mines belong to it;<sup>4</sup> escheats of land, treasure trove, and the estates of persons dying intestate without kin fall to it.<sup>5</sup> It enjoys priority for its debts in bankruptcy and the winding up of companies;<sup>6</sup> its ships are exempt from seizure in respect of salvage claims or claims for damage done by collision.<sup>7</sup>

<sup>1</sup> *Calvin's Case* (1608), 7 Co. Rep. 1a, 9b; *Process into Wales* (1674), Vaugh. 395, 400.

<sup>2</sup> It rests with the Governor-General of Canada to allow a petition of right to be brought: *Lovibond v. Governor-General of Canada*, [1930] A.C. 717. For Western Australia see *R. v. McNeil*, [1927] A.C. 380; for South Australia, *Laffer v. Gillen*, [1927] A.C. 886. See Chapter XI (2), *post*.

<sup>3</sup> *A.-G. for Saskatchewan v. A.-G. for Canada*, [1932] A.C. 28. The question of the foreshore in the Union is regulated by Act No. 21 of 1935; *J.P.E.* 1935, pp. 696-8.

<sup>4</sup> *Hudson's Bay Co. v. A.-G. for Canada*, [1929] A.C. 285.

<sup>5</sup> *A.-G. for Ontario v. Mercer* (1883), 8 App. Cas. 787; *A.-G. for Alberta v. A.-G. for Canada*, [1928] A.C. 475; *bona vacantia* of companies, *R. v. A.-G. for British Columbia*, [1924] A.C. 213.

<sup>6</sup> *Liquidators of Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437. What is to be regarded as a representation of the Crown is discussed in *Metropolitan Meat Industry Board v. Sheedy*, [1927] A.C. 899.

<sup>7</sup> *Young v. S.S. Scotia*, [1903] A.C. 501. No suit can be brought in England against a Dominion Government by treating it as a corporation: *Sloman v. Government of New Zealand* (1876), 1 C.P.D. 563.

Local law may abandon<sup>1</sup> or diminish these claims; but, failing that, they can be asserted on behalf of the Crown by the Government and the courts will give effect to them when pleaded.<sup>2</sup>

(2) Neither statute nor prerogative, that is common law, explain much that is vital in the government of the Dominions. That government rests essentially, as in the United Kingdom, on conventions of the constitution which are not law in the sense that any of them can be directly enforced by legal action. From the first the British Government was most reluctant to hamper the growth of Dominion autonomy by efforts to transmute into law the constitutional practice of the United Kingdom. In the colonies, of course, there was a certain reluctance to adopt this point of view. It was felt that the change from Imperial control to virtual self-government ought to have a counterpart in law, and, if the constitutions of the colonies had been framed entirely to meet their wishes, there would have been some effort to embody in them the rules of constitutional practice as law. But the British objections gradually came to be appreciated in the colonies, and in most of the Dominions the legal provision to compel responsible government is minimal. It is significant that, even when the Commonwealth constitution was being adumbrated, some of its framers held that federalism and responsible government were incompatible, and that even at so late a date the provision for responsible government was far from sufficient.

<sup>1</sup> *Commonwealth v. New South Wales* (1923), 32 C.L.R. 200: suit in tort by Commonwealth against New South Wales authorised by Judiciary Act.

<sup>2</sup> As to privilege against disclosure of documents, see *Robinson v. South Australia*, [1931] A.C. 704, Keith, *Journ Comp Leg.* xiii. 261, 262; xvi. 206-8; *Rayner v. R.*, [1929] N.Z.L.R. 805; *Spigelman v. Hocker* (1933), 50 T.L.R. 87, *Leen v. President of the Executive Council*, [1928] I.R. 456.

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Applied to Dominion conditions, responsible government<sup>1</sup> demands that the powers of the Crown or its representative, whether resting on the prerogative or on statute, must be exercised on the advice of ministers. Ministers must be members of the legislature, and possess the confidence of the majority thereof, save that, if such confidence is withheld, they may be permitted to remain advisers pending the result of an appeal to the political sovereign, the electorate. A ministry depends on the leadership of the Prime Minister, who is selected by the Crown as commanding the support of the majority of the lower house and who recommends his colleagues for office. On defeat in that house on any important issue a ministry must resign unless it is granted a dissolution. A ministry must observe solidarity of action and of responsibility to the lower house.

Of these and minor rules there is little expressed in Dominion constitutions. In Canada convention is relied upon. The British North America Act, 1867, s. 11, provides for the existence of a Privy Council to assist the Governor-General, but its composition is not defined by law, and in 1926 the Privy Council Committee, which serves as Cabinet, was actually for a time composed of only one minister who had definitely been appointed to office, the other members being acting ministers only, a device adopted to prevent them having to face the necessity of re-election, then required in the Dominion on acceptance of ministerial office. It was on the advice of this body that millions of dollars were authorised to be spent without sanction of Parliament, which was dissolved, and in fact the electorate inflicted a crushing defeat on the then ministry. Yet no action in law was possible to prevent such expenditure being incurred, and the new Parliament had to acquiesce in what had been

<sup>1</sup> Cf. Ridges, *Const. Law of England* (ed. Keith), Part III, chap. ii.

thus done.<sup>1</sup> The provinces have gone little further; to the Executive Councils, which their statutes set up, are assigned certain ministers, but there is nothing in law to secure that they shall represent the majority in the legislatures or even be members thereof. Newfoundland was granted responsible government entirely under the prerogative, and it rests wholly on convention. In the case of the Commonwealth the political heads of departments are to be appointed by the Governor-General, and are to be the King's Ministers of State and members of the Executive Council; if not already, members of the legislature they must become so within three months after appointment; but there is nothing in law in any of these cases to provide for the command by the ministers of the majority of the lower house, nor even to prevent the Governor-General swamping the Council by his own nominees. The Union Constitution of 1909 follows the Commonwealth model. Moreover, in the two federations and the Union, as also in the States of Tasmania and Victoria, the Councils include ex-ministers, appointment being deemed to be for life as in the case of Privy Councillors in the United Kingdom, though again by convention only those members attend meetings of the Governor in Council who are specially summoned.<sup>2</sup> New Zealand again relies on convention; its Executive Council contains ministers but is not limited by law to them, and they need not in law be even in Parliament. In all cases, that ministers should be in Parliament is tacitly recognised by the rule forbidding persons holding office under the Crown other than political office to sit in Parliament.

In the Australian States convention in the main governs,

<sup>1</sup> Keith, *Journ. Comp. Leg.* viii. 128 f., 275-80.

<sup>2</sup> It rests with the Prime Minister to direct who shall be summoned, as in Canada, June 29, 1926.

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as was seen in 1907 when the Governor of Queensland carried on the government for months with a ministry which had never had a majority in the legislature, and which spent money without sanction of Parliament. New South Wales and Tasmania, as well as Western Australia, are likewise content with convention; it is significant that in 1925 the acting Governor of Tasmania actually contemplated consulting ex-ministers as members of the Executive Council, and only desisted on the protests of the then ministry. Victoria has gone so far as to require that four out of eight ministers must be in parliament, and since 1903 that no minister can hold office longer than three months unless he obtain a seat in one or other house. South Australia, since its introduction of responsibility in 1856, demands membership of Parliament on appointment or within three months, and by a unique provision enacts that no warrant of the Governor for payment and no appointment or dismissal shall be valid unless countersigned by the Chief Secretary, a most interesting legal affirmation of the doctrine of counter-signature, which has been established in the United Kingdom by convention reinforced by the action of the courts based on that convention.

How in the absence of legislation is obedience to the principles of responsible government secured in practice? No doubt largely it rests on the political sense of the people, which condemns straining of authority, and, as in the case of Queensland in 1907-8 and Canada in 1926, censures by the voice of the electorate the action of any Government which misuses its power. More technically, the necessity of obtaining supply is a powerful check on disregard of the legislature; failure to consult Parliament, whose annual meeting is provided for by law, would involve inability to collect much of the revenue, and expenditure would be in the main illegal,

and, though there is difficulty in legal proceedings in such cases, might indirectly at last be dealt with by the courts.<sup>1</sup> Chapter V.

But it is also clearly the duty of the Governor in the last resort to intervene to secure the observation of the conventions of the constitution, as will be shown later, just as it is his duty to intervene in the far more difficult case, when a ministry supported by a majority in the legislature insists on defying the law, or desires to extend the life of the legislature and thus to deprive the electorate of its effective control of its representatives.

In the Irish Free State, in view of the dangers of mere convention, a most elaborate effort has been made to stereotype as law the conventions of the constitution. The constitution of 1922 created the Executive Council and declared its responsibility to the Dáil Eireann, the lower house. The selection of the President of the Council, *i.e.* the Prime Minister, was expressly given to the Dáil, excluding any discretion on the part of the Governor-General; the President selected his colleagues, but with the approval of the Dáil. The ministry thus chosen must retire from office if it ceased to command a majority of the Dáil, holding their posts merely until a new ministry was installed. The Dáil fixed the date of the conclusion of each session and of the reassembling of Parliament. It was expressly forbidden to the Governor-General to dissolve the Dáil on the advice of a ministry which did not command a majority of that body. This provision, of course, was a complete violation of precedent, for the grant of a dissolution to a defeated ministry

<sup>1</sup> In 1936 the desire of Mr. Lyons to dissolve was defeated by refusal of the Country party members to vote supply, and in 1937 Mr. Aberhart's policy was likewise controlled in this way by malcontents. In 1936 the Opposition in Quebec held up the budget and forced Mr. Taschereau's resignation, and a dissolution by his successor, which gave them a sweeping victory; *J.P.E.*, 1936, pp. 537 f., 783 f.

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to try the temper of the electorate and allow it to decide is a procedure accepted as proper not merely in the United Kingdom but in every other Dominion. It was the refusal of a dissolution in analogous circumstances to Mr. Mackenzie King in 1926 which was regarded in Canada as a grave breach of constitutional propriety and had an important effect on a redefinition of the functions of the Governor-General. It must remain a matter of doubt how these provisions could in law be enforced; very possibly the courts would feel entitled to use their powers to issue writs of mandamus or prohibition, but this must remain conjectural, for no effort has been made to depart so far from the letter of the law.

The Constitution of Éire slightly varies the provisions of the existing constitution. The Prime Minister (*Taoiseach*) is made undisputed master in his Government, as the Cabinet or Executive Council is renamed.<sup>1</sup> It must number not less than seven or more than fifteen, and the Prime Minister is nominated by the Dáil and appointed by the President. The Prime Minister, with the approval of the Dáil, nominates for appointment by the President the other members of the Government. He can require any member to resign, and his own resignation carries with it by law those of his colleagues, who remain in office until their successors are appointed. The Prime Minister appoints a deputy, *Tánaiste*, who, as well as the minister in charge of the Department of Finance, must be a member of the Dáil; the other ministers must be in one chamber or the other, but not more than two in the Senate. The Prime Minister must resign if he ceases to retain the support of a majority in the Dáil, unless on his advice the President allows him a dissolution. All ministers during a dissolution remain in office until their successors are

<sup>1</sup> Art. 28 and Art. 13.

appointed on the assembling of the Dáil. There cannot be any change of government during the period of dissolution, which is plainly inconvenient. The President has no power to compel resignation by a Prime Minister who still commands the support of the Dáil, but, if the Dáil is not in session, he can summon it to meet at his discretion after consulting the Council of State,<sup>1</sup> a purely advisory body, composed of *ex officio* the Taoiseach, the Tánaiste, the Chief Justice, the President of the High Court, the Chairmen of the Dáil and the Senate, and the Attorney-General, who under the constitution becomes a non-political officer, in so far at least that he cannot be a member of the Government as he has regularly been in the past.<sup>2</sup> There may also serve any ex-President, or ex-Taoiseach, or ex-Chief Justice, or ex-President of the Free State, and the President may add at pleasure seven members, but the responsibility of any action remains with him.<sup>3</sup>

It will be seen that the control of the legislature over the Government is considerable, but the power to obtain a dissolution on defeat restores the normal British system and strengthens the hands of the Prime Minister while it also adds importance to the office of President.

(3) The Colonial Laws Validity Act, 1865, granted, as we have seen, to the colonies constituent power, even if it had not existed before. But the grant was accompanied by one essential condition: the Bill to amend the constitution must comply with such "manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Orders in Council or colonial law for the time being in force in the said colony". This condition imposed a vital limitation on the powers of colonial Parliaments as opposed to those of the Imperial Parliament. The latter cannot bind any

<sup>1</sup> Art. 13 (2).

<sup>2</sup> Art. 30.

<sup>3</sup> Art. 31.

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successor; if it prescribed a mode of altering the constitution, that could be disregarded by its successor, and the courts would obey the later law. In the case of the colonies, any law must conform to any conditions as to manner and form required by the existing constitution. If it does so, then it is valid. But it is not necessary that a formal alteration of the constitution should be announced. If an Act by necessary intendment or mere reference clearly is meant to alter the constitution, it can effectively do so. Thus the Privy Council<sup>1</sup> overruled the High Court of Australia when it held that Queensland could not, without a deliberate alteration of the constitution, provide for the appointment of a judge with seven years' tenure of office, life tenure being the rule laid down in the constitution. Nor, of course, is it any alteration of the constitution to impose income tax on judicial salaries,<sup>2</sup> even though the remuneration of judges under the constitution is not to be altered during their tenure of office, a necessary safeguard for their impartiality.

The effect of the rule of 1865 has been most clearly shown by the decision in 1932 of the case *Attorney-General for New South Wales v. Trethewan*.<sup>3</sup> The Parliament of the State by Act No. 28 of 1929 provided that the Legislative Council should not be abolished save after a referendum to the electors, and that the provision to this effect should be subject to the same rule. To secure this end any Bill to abolish the Council or repeal the clause was not to be presented to the Governor for assent until approved by the referendum. In 1930 the Labour Government of the State, determined to undo the work of its predecessor, passed two

<sup>1</sup> *McCawley v. The King*, [1920] A.C. 691.

<sup>2</sup> *Cooper v. Commissioner of Income Tax for Queensland* (1907), 4 C.L.R. 1304.

<sup>3</sup> [1932] A.C. 526; (1931) 44 C.L.R. 394.

Bills, one to repeal the clause and one to abolish the Council. The Supreme Court granted an injunction forbidding presentation of the Bills for assent; this decision was upheld by three judges out of five on appeal to the High Court, and by the Privy Council. It is plain indeed that the meaning of the proviso to the Act of 1865 was exactly to cover such an action as was intended by the Act of 1929, despite the ingenuity with which the contrary view was argued.

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The decision makes it clear that in the main the existing restrictions on change are effective. The conditions imposed on the Australian States by the Imperial Parliament under Acts from 1842 to 1862 were complex; they were swept away in 1907, and the only rules required by Parliament involve the reservation of Bills to alter the salary of the Governor or the constitution of the legislature or either house. But this does not apply to Bills to alter electoral districts, the number of members, their qualifications, or electoral procedure. In Victoria, South Australia, and Western Australia the States have imposed on themselves the requirement of absolute majorities on the second and third readings. It must be noted that it might be very difficult in a court of law to prove that the necessary majorities had not in fact been secured.<sup>1</sup> How wide the power of change is, is shown by the successful abolition of the Legislative Council of Queensland<sup>2</sup> in 1921–2, for despite the necessary reservation of the measure it was duly assented to by the King on the advice of the Colonial Secretary on the ground that it was a local matter. It cannot now be revived without a referendum, and any extension of the

<sup>1</sup> See Colonial Laws Validity Act, 1865, s. 6; *Bickford Smith & Co. v. Musgrave*, 17 V.L.R. 296; *Clydeedale v. Hughes* (1934), 51 C.L.R. 518; Keith, *Letters on Imperial Relations, 1916–1935*, pp. 290–92; Australian States Constitution Act, 1907.

<sup>2</sup> *Taylor v. A.-G. for Queensland* (1917), 23 C.L.R. 457.

Chapter duration of Parliament is similarly restricted by the Constitution Act Amendment Act, 1933.

V. *New Zealand* was given by the Constitution Act of 1852 a limited power of repeal, but on the whole it seems probable<sup>1</sup> that the limitation was removed implicitly by the general terms of the Colonial Laws Validity Act, 1865, and that it has full power of change. But, until it exercises it, Bills to alter the Governor's salary or the sum reserved for native affairs must be reserved. The Statute of Westminster, 1931, expressly leaves the matter *in statu quo*, and the issue whether it is possible for the Parliament to abolish the Legislative Council must remain undecided unless and until that proposal is proceeded with. The Statute, however, has no restriction as to Newfoundland, and, if the Parliament applies Section 2 of the Statute, it will become possessed of full constituent powers, for the only restrictions on its authority are provisions contained in Imperial Acts authorising the Crown to impose qualifications for membership of the Assembly, residential qualifications for electors, simultaneous holding of elections, and the recommendation of money votes by the Governor. The Canadian provinces are given freedom to modify their constitutions save as regards the federal office of Lieutenant-Governor.

The position of the *Dominion of Canada* is very different from that of the provinces. Neither, of course, can alter the distribution of powers or the federal scheme as laid down in the British North America Acts, 1867–1930, but Canada is denied the authority to deal with any important part of the frame of government. Even to appoint a deputy Speaker an Imperial Act was requisite, and it cannot change the rules as to the executive or the relations of the two houses or the composition of the Senate; though it may provide as to

<sup>1</sup> Keith, *Responsible Government in the Dominions* (ed. 1928), i. 354, 355.

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electoral qualifications for the Commons, it is bound to provide for the number of seats so that Quebec shall have 65 and the other provinces a proportionate number, based on population. It is natural that the passing of time should have rendered the position difficult. The fathers of federation believed that the distribution of powers in the Act of 1867 would be effective and sufficient; it is in fact inadequate and inconvenient, but no authority exists to change it save the Imperial Parliament, and the vital question, therefore, is on what grounds can that Parliament act. Formally its numerous changes in minor matters have been carried out on addresses from the two houses of the Dominion Parliament, but the real issue is what amount of agreement as the basis of these addresses would suffice for British action. Would the British Parliament be justified in enacting a change in the constitution desired by the Dominion Parliament but strongly objected to by the province of Quebec or some other province or provinces? It must be remembered that Canada falls for practical purposes into four clear groupings, the maritime provinces, Quebec, Ontario, and the western provinces, and that there is often sharp cleavage of interests.

In the extreme form it has been claimed apparently by Mr. G. H. Ferguson, when Premier of Ontario, that no change of importance can be made without provincial consent; apparently any great province, possibly any province, by withholding assent could block change. This view is based on the idea that the federal bond is the result of a compact or treaty, a term which admittedly was often used in the debates in the Canadian legislature when that body in 1865 approved the agreement achieved with the maritime provinces in 1864. To this view it is objected that in fact the Quebec agreement was never accepted by the legislatures of

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Nova Scotia and New Brunswick, and that in fact in certain matters the constitution prepared in 1864 was modified under Imperial auspices before enacted in 1867, while as regards the other provinces, especially those created by the Dominion, Manitoba, Saskatchewan, and Alberta, any idea of a compact is absurd. The most effective answer to this contention is the fact that in 1907, when an Imperial Act was passed to vary the then existing state of provincial subsidies from the federation, it was based on the assent of all the provinces, for, while British Columbia demanded better terms, its Premier did not refuse finally to agree to the Act being passed. It is useless to ignore the importance of this precedent, whether it was wise to create it or not.<sup>1</sup> What is clear is that amendment by the Imperial Parliament would be a very delicate matter, if it was opposed by any substantial body of Dominion opinion and by one or more of the provincial legislatures, and it is natural that repeated efforts should have been made as in 1927 to enable Canada to amend her own constitution without appeal to the Imperial Parliament, a necessity which involves a clear diminution of formal if not of real status.

The view that wide accord is necessary for any change has also been strengthened by the proceedings affecting the passing into law of the Statute of Westminster, 1931. Mr. Bennett's account of the matter in the Canadian House of Commons, June 30, 1931, is clear.<sup>2</sup> He attained office the year before on the defeat at the general election of the

<sup>1</sup> The theory of contract is clearly recognised by the Privy Council in the *Aeronautics Case*, [1932] A.C. 54 (Contrast Ewart, *Can. Bar Review*, ix. 726-8), and again in *A.-G. for Canada v. A.-G. for Ontario* (1937), 53 T.L.R. 325, 329; [1937] A.C. 326. Mr. Ferguson's view and Mr. Rogers' reply are given in Dawson, *Const. Issues in Canada, 1900-1931*, pp. 28-45.

<sup>2</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 212 f., 257-60.

Liberal Government, and before going to the Imperial Conference he received representations from Ontario and Quebec asking to be consulted. As a result the report of the Conference recognised that the federation must consult the provinces, and included a paragraph suggesting that, after consultation had taken place, it might be necessary that the Statute should not apply to Canada. On return home the Prime Minister convened a conference with the provinces which resulted in an accord, under which the provinces were relieved from the control of the Colonial Laws Validity Act, 1865, in matters within their legislative sphere, and it was agreed to secure also in the Statute the restriction of the federation to matters within its power under the British North America Acts, 1867-1930. Naturally Mr. Bennett did not commit himself in terms to the view that there could be no alteration of the constitution save by the assent of all the provinces, but his securing their assent was in entire accord with the precedent of 1907 and has added greatly to the strength of the provincial position. In the same sense, but more definitely, Mr. H. Guthrie, Mr. Bennett's Minister of Justice, in 1935 asserted that change of provincial powers as granted by Section 92 of the British North America Act, 1867, would require not merely the consultation of the provinces but also their assent, and for the opposition Mr. Lapointe, while eager for Canada to have the power to change her constitution, stressed the autonomy of the provinces and the impossibility of the Imperial Parliament depriving them without their assent of the power to deal with property and civil rights.<sup>1</sup>

After discussion of the difficulties of the situation, especi-

<sup>1</sup> *J.P.E.*, 1935, pp. 286 ff. Mr. Mackenzie King and Mr. Lapointe in 1937 asserted the necessity of obtaining provincial agreement; *J.P.E.*, 1937, pp. 338-41.

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ally as regards finance, by a Conference in December, 1935, the Liberal Government in 1936<sup>1</sup> brought down proposals under which the provinces might with retro-active effect impose a sales tax except in respect of spirits, malt, alcoholic beverages, tobacco, cigarettes, and cigars, and goods for delivery without the province, and might tax the patronage of hotels or places of entertainment, and the federal Government might, on such conditions as it thought fit, guarantee provincial loans. The proposal was supported by the provinces, but was hotly attacked in Parliament, and the powers of indirect taxation were refused by the Senate. Contemporaneously a debate was carried on regarding the power of amendment without eliciting any accord of any kind. But it is significant that Mr. R. Dandurand, a well-qualified exponent of Quebec views, urged that Quebec might find a greater safeguard than at present if the power to amend were given to Canada, but subject to the express assent of the provincial legislatures in certain well-defined spheres. What can be said with some degree of certainty is that there is being developed in Canada a greater readiness to consider some scheme by which that Dominion should have the right to amend the constitution without the necessity of action by the Imperial Parliament.

Any such system itself would have to be authorised by Imperial Act, but then could operate independently of it. It would involve safeguards for language and religious questions, so that Quebec could negative any proposal which in her opinion menaced the present safeguards; it would necessitate also provisions by which changes in other matters of legislative authority could be made only when to the approval of the Dominion Parliament by perhaps two-

<sup>1</sup> J.P.E., 1936, pp. 517 ff. The Conference was suggested by a Special Committee of the Commons (*Proceedings*, 1935, p. xm.).

thirds majorities of either house was added the assent of the majority of the provinces, including Ontario and Quebec. It is, however, clear that the utmost difficulty lies in achieving agreement, and so far provincial discussions with the Dominion have succeeded only in displaying the profound divergencies of view prevalent. The failure of the Dominion efforts to enter the provincial sphere under plea of the exercise of the treaty power adds very gravely to the need for change.<sup>1</sup>

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In the case of the *Commonwealth*, neither the Commonwealth nor the States alone can alter the federal distribution of powers or the constitutional position in general. The States, as has been seen, can amend their own constitutions, and the Commonwealth has certain powers, in a limited but not unimportant field. Thus it was permitted after ten years to determine the mode of contribution to State expenditure, a power which has proved of the utmost importance in controlling relations with the States. Similarly the franchise has been determined freely by the Commonwealth. But in vital matters the procedure is more elaborate. The measure must be passed by absolute majorities in both houses, and then submitted to a referendum of the electorate not earlier than two or later than six months after its passage. If the two houses disagree, and one passes it twice with an interval of three months in the same or a subsequent session, then the Governor-General may submit the measure to the electors. This, however, has been interpreted in practice to mean that the power to submit is to be exercised on ministerial advice, which means that normally the Senate cannot force a reference to the electorate, since the ministry, being responsible to the House of Representatives, would refuse to advise submission, as was the case in 1914. The measure, to become ripe for submission for the royal assent,

<sup>1</sup> See Chapter XIII (2), *post*.

Chapter V. must be approved by a majority of electors and by a majority of States. Moreover, there must be a majority in any State if any provision altering the proportional representation of the State in either house of Parliament, or the minimum number of members in the lower house, or the limits of the State, or in any way affecting the provisions of the constitution in relation thereto, is to be valid. The proviso is rather vague, but it must clearly mean that consent is necessary only as regards changes affecting specific provisions in favour of the State.

The extent of the power of alteration is disputed. But clearly it must include the right to vary the clauses setting forth the powers of the Commonwealth and the States. Can it abolish the States? There are difficulties in holding that the abolition is within the power to alter. It is pointed out that the Commonwealth of Australia Constitution Act, 1900, was passed to unite the colonies in an indissoluble federal Commonwealth, and that it is improper that the power of change should extend to destroying the federal character of the constitution. Section 106 of the constitution provides that the constitution of each State shall, subject to the federal constitution, continue until altered by the Parliament of the State, and it is possible to argue that this clause is not within the power of alteration given by Section 128. The matter is clearly open to dispute, but it is certain that any attempt at unification would necessitate the concurrence of all the States in the referendum, since a single rejection would render the scheme impracticable of operation, so that, if unification is ever to be accomplished, it would seem that an Imperial Act will be necessary. The Labour Ministry in 1931 dropped a projected referendum to secure power to alter freely as certain to be ineffective. The Statute of Westminster expressly leaves the

matter as at present, negating the claim that was about to be made in Australia that the Commonwealth Parliament could annul the constitution at pleasure by repealing the Imperial Act of 1900 in which it is embodied.

The Statute, however, left the *Union* unfettered, and the position, therefore, is delicate. Under the South Africa Act, 1909, and the Colonial Laws Validity Act, 1865, there were certain restrictions on the constituent power of the Union Parliament, though of a simple kind. In part these have expired by efflux of time, and those essentially remaining are restricted to the rule that any alteration of Section 152 regulating the right of change, or of Section 35 safeguarding the Cape native franchise, or of Section 137 providing for the equality of English and Dutch (now also Afrikaans) as languages, shall require the assent of the two houses of Parliament in joint session, and on the third reading a majority of two-thirds the total number of members of both houses. It was naturally suggested that the cessation of application of the Colonial Laws Validity Act, 1865, meant that the Parliament could repeal these rules by simple Act, and doubtless a strong legal argument could be made out in this sense. But the two houses in 1931, when approving the proposed enactment of the Statute, expressly put on record the view that neither of the Sections 35 or 137 could be repealed or altered except under the condition specified. The justification for this ruling is clear;<sup>1</sup> the Union was based on a compact arrived at between the representatives of the colonies, and to violate it would be dishonourable, even assuming that it was legal. In the face of the resolution, it may be surmised that the South African courts would try

<sup>1</sup> Keith, *Journ. Comp. Leg.* xii. 247, 248. For the abolition of the native franchise in its existing state in 1936 the full procedure was followed; *ibid.* xviii. 284 f. But *Ndlwana v. Minister of the Interior* (1937), *ibid.* xix. 271, shows that any Act duly assented to would have to be accepted without enquiry.

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hard to find a legal ground for denying the validity of any measure which ignored these resolutions. The reservation of certain Bills under Section 64 of the Act was from 1930 a mere formality, as explained above, and was formally removed from the Act in due course by the Status of the Union Act, 1934.

The case of the *Irish Free State* presents very interesting considerations. Article 50 of the constitution provided for alteration by an Act of Parliament, in which the Senate had only a power of delay, not of negating a Bill passed by the Dáil, followed by a referendum of the electorate. To pass, a measure must be voted on by a majority of voters on the register, so that abstentions might defeat it, and be approved either by such a majority or by two-thirds of the votes cast. It was, however, recognised that, as the constitution was experimental, this process might be unadvisable in the first instance, and therefore alteration by ordinary legislation was permitted for the first eight years. A safeguard, however, was provided, for any such Bill was made subject to the provisions of Article 47, which provided for a referendum, if demanded by three-fifths of the members of the Senate or a twentieth of the voters on the register within ninety days after its passage, provided that its suspension had been demanded either by two-fifths of the Dáil or by a majority of members of the Senate. But this rule was not to apply to Bills declared by both houses to be necessary for the immediate preservation of the public peace, health, or safety. The attempt to safeguard the rights of the people proved to be illusory by reason of this addition, for under it an Act, No. 8 of 1928, was hastily and most unconstitutionally passed, which repealed Article 47 and left the Parliament free to alter the constitution at will by simple Act. A logical sequel of this decision was the passing of an Act, No. 16 of

1929, which extended to sixteen years the period of freedom of change.<sup>1</sup>

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There was, however, one essential condition affecting change; Article 50 sanctioned only amendments of the constitution within the terms of the scheduled treaty of 1921, and what is still more important, the constitution itself owes its being to an enactment of the Dáil Eireann sitting as a Constituent Assembly. That body by its Constitution of the Irish Free State (Saorstát Eireann) Act, 1922, expressly gave legal effect to the terms of the treaty and provided that "if any provision of the said constitution, or of any amendment thereof, or of any law made thereunder, is in any respect repugnant to any of the provisions of the scheduled treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative, and the Parliament and the Executive Council of the Irish Free State shall respectively pass such further legislation and do all such other things as may be necessary to implement the scheduled treaty". These provisions raised a fundamental difficulty as regards the measure which was passed in 1932 by the Dáil with a view to eliminate from the constitution Article 17 prescribing the form of oath to be taken by members of the Parliament. It was apparently felt that this would be impossible if the restriction of amendment within the terms of the treaty applied, and so the Bill provided for the elimination from Article 50 of reference to the treaty and the repeal of the provision of the Act of 1922 cited above.<sup>2</sup> The issue, of course, then arose by what right the Parliament could eliminate a condition imposed on its activity. The Parliament of the Free State owed its existence

<sup>1</sup> The validity of the extension was affirmed by the majority of the Supreme Court in *The State (Ryan) v. Lennon*, [1935] I R. 170.

<sup>2</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, p. 489; *Journ. Comp. Leg.* xiv. 107.

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in Irish eyes solely to the activity of the Constituent Assembly; that Assembly representing the will of the people of Ireland deliberately limited the constituent power of the Parliament, but its creation now asserted that it was entitled to act as a fully sovereign power and to disregard the essential conditions of its operation. There seemed, from the standpoint of English law, no possibility of the courts upholding such power, but the enactment was proposed, doubtless, in a deliberate attempt to establish the sovereign character of the Parliament, and may be deemed a quasi-revolutionary suggestion. It is important to note that no question of Imperial control was involved. The Statute of Westminster clearly gave the Irish Parliament right to act without regard to the Imperial Act of 1922 establishing the Irish constitution; the point was the Irish constitution itself, and no intelligible argument on legal grounds to defend the proposal of Mr. De Valera has ever been adduced. The objection that a treaty should not be made part of municipal law is clearly irrelevant; the point is that it had been made part of that law by a constituent assembly, to which the Irish Parliament on Irish theory owed its being, and by which it was accorded only limited powers.<sup>1</sup> The solution should rather have consisted in the creation of a new Constituent Assembly, representing the people, to revise their mandate to the legislature. Such action, though extra-legal, would not have been subject to the serious legal objections of the present procedure.

The issue, however, never came before the Irish courts, and when it was raised in the case of *Moore v. Att.-Gen. for Irish Free State*,<sup>2</sup> the Privy Council took a view naturally

<sup>1</sup> Cf. the views of all the justices in *The State (Ryan) v. Lennon*, [1935] A.C. 170.

<sup>2</sup> [1935] A.C. 484. The view that in this case and in *British Coal Corp. v. The King*, [1935] A.C. 500, the Privy Council strained the law in favour of the Dominions appears to me without substance (contrast Dixon, J., *Aust. Law*

based on British law only. The issue there was whether the State could abolish by legislation the right of the King in Council to grant special leave to appeal. This provision had been inserted in the constitution of 1922 on the express insistence of the British Government, which had taken exception to its non-appearance in the original draft, on the ground that the constitution of the Free State must conform under the treaty to the Canadian model in which the appeal was essential. It was, of course, possible to contend that the argument was unsound, seeing that the appeal could be asserted to be due to the federal character of the Canadian constitution, and, in support of this contention, stress could have been laid on the fact that the Irish Free State had been allowed to depart widely from the Canadian model, especially in the vital fact of the non-rigidity of the constitution, a deviation explained by the non-federal character of the State. But the Privy Council in *Performing Right Society Ltd. v. Bray Urban District Council*<sup>1</sup> had committed itself to the view that the right to grant leave to appeal was implicit in the treaty, and therefore the right to abolish the appeal could be valid only if the Free State had power to override the treaty. It ruled that it had the right, and that it had been duly exercised in the Constitution (Removal of Oath) Act. The ground was, naturally enough, that in the view of the Council the Irish constitution rested entirely for legal effect on the Imperial Act of 1922, the Irish Free State Constitution Act, and that power to alter that Act had been given by the Statute of Westminster absolutely. The proceedings of the Constituent Assembly

*Journ. x. Supp.* 96 ff ; Jennings, *L.Q.R.* *ln.* 173 ff ; MacDonald, *Can. Bar Rev.* *xvi* 625). The Conference of 1930 was well aware that the criminal appeal in Canada and the appeal in general in the Free State would be abolished when the Statute of Westminster was passed.

<sup>1</sup> [1930] A.C. 377 (an undefended case).

Chapter V. were thus treated as if they were the lucubrations of a private body, which possessed no validity save under an Imperial Act. The result, while asserting the right of the Free State to abolish the oath and the appeal alike as a matter of law, did not touch on the contractual relations between the countries which thus were affected. The Privy Council indeed used rather unfortunate language in the judgment, speaking as if the Statute of Westminster gave power to repeal the treaty, which of course it did not do. It merely gave power to repeal legislation giving effect to the treaty, which is a totally different thing, not merely in form but in substance.<sup>1</sup> If the Statute had given power to repeal the treaty then there would have been no conceivable ground for the British Government objecting to the removal of the appeal or of the oath, for that would have contradicted the grant of the Statute of Westminster. Naturally, however, the careless language of the Privy Council has been used to show in the Free State that the British Government had tried to blame the State for doing what it was always known that it would do when the Statute was passed. In fact, of course, it had been announced before the passing of the Statute by Mr. McGilligan that the appeal would be abolished, and the British Government must have acted with its eyes open on this score. Unfortunately the Government on December 6, 1933,<sup>2</sup> took up the view in the House of Lords through Lord Hailsham that the State had no right to abolish the appeal, and thus placed itself in the inconvenient position of denying what it turned out was a perfectly legal action on the part of the Free State, and one which had been frankly avowed before the Statute was passed.

<sup>1</sup> Keith, *Letters on Current Imperial and International Problems, 1935-1936*, pp. 38 ff.

<sup>2</sup> Keith, *Letters on Imperial Relations, 1916-1935*, p. 147.

The judgment of the Privy Council naturally created a new position for the Supreme Court, rendering it very difficult for it to negative the right of the legislature to make a complete change. The issue, however, was made relatively unimportant by the adoption of the best way out, the preparation of a new constitution which would only take effect after enactment, subsequent to a general election and a plebiscite at which its approval or rejection would be the issue before the people. It is clear that the situation demanded such action, especially as the Ministry desired at the same time to obtain the endorsement of the electorate for the adoption of the doctrine of mere external association with the United Kingdom for which Mr. De Valera had energetically pleaded in 1921–2, but which, with the usual fatality which dogs Irish relations with Britain, had been refused by the ill-fated British Government.<sup>1</sup>

The Constitution of Éire, therefore, while ignoring entirely the treaty of 1921, provides<sup>2</sup> that it itself may be altered, except as regards the power of alteration itself, by ordinary legislation for a period of three years after the first President takes office, but the President may, after consulting the Council of State, at his discretion require that the proposed amendment should be the subject of a referendum. Otherwise the procedure provided by Article 46 is enactment on the initiative of the Dáil, and reference to the people when a simple majority<sup>3</sup> of the votes cast by the electors determines its fate. No other proposals may be conjoined with such a Bill, and the President's duty before signature is to see that the matter has been passed in due accordance with the terms of the constitution.

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916–1935*, p. 34.

<sup>2</sup> Art. 51.

<sup>3</sup> Art. 47 (1).

## CHAPTER VI

### BRITISH AND DOMINION NATIONALITY

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— (1) FROM early times the British doctrine as to nationality connected it essentially with birth on British territory, which carried with it natural allegiance. Other persons, such as the children of British subjects born abroad, could obtain nationality as British subjects only by Imperial legislation. But to meet the needs of the colonies permission was finally granted for local naturalisation under colonial Acts, such naturalisation having effect only within the limits of the colony, the person so naturalised being an alien in any other British territory. Naturalisation could also be granted in the United Kingdom, first by special Act and from 1844 by a general Act, and on the whole it was held that persons so naturalised were British subjects throughout the Empire. The rather chaotic condition of matters as to naturalisation resulted in 1914 in the enactment of an agreed measure which had been approved by the Imperial Conference of 1911, and under which it was hoped that, while local naturalisation might have to be maintained, in the main it would be superseded by an Imperial naturalisation to be granted in any part of the Empire to persons complying with certain conditions. At the same time the Act defined authoritatively who were to be deemed throughout the Empire natural-born British subjects.<sup>1</sup>

<sup>1</sup> Dicey and Keith, *Conflict of Laws* (1932) chap. iii; and as to married women, 23 & 24 Geo. V. c. 49.

The status of a natural-born British subject is ascribed to every person born within the British dominions (not being the child of a foreign diplomat or alien enemy in occupation of British territory) or on a British ship wherever it is. Moreover, the child of a British subject father is a natural-born British subject, though born out of the British dominions, in certain conditions. It is necessary that the father should be alive at the time of the child's birth, and be either a natural-born British subject born in the British dominions, or born in a place where the King has extra-territorial jurisdiction, or have been naturalised, or have become a British subject by annexation of territory (as in the case of the South African Republics or Cyprus), or have been in the service of the Crown at the time of the child's birth. If none of these conditions is fulfilled by the father, the child's birth may be registered within a year at a British consulate, and he will be able to retain British nationality provided that, within a year after attaining age twenty-one, he asserts his retention of such nationality and where possible divests himself of any foreign nationality which he may also have.

Naturalisation can be acquired on proof of residence for five years within the eight preceding years in the British dominions, the last year having been spent in the part of the Empire in which he applies for naturalisation, and of intention to reside in the British dominions. Service under the Crown may take the place of past or proposed residence. Knowledge of English, or in Canada French, or in the Union Dutch including Afrikaans, is requisite, and good character, and the power to grant is absolutely discretionary. A grant may on certain conditions be revoked. Naturalisation normally gives British status to the wife and may be extended to include minor children.

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British nationality is lost by naturalisation in a foreign country, though this is impossible during war, and any person who, though born in the British dominions or on a British ship, also acquires under foreign law another nationality on birth, or who though born out of the British dominions is reckoned a natural-born British subject, may make, when of full age, a declaration of alienage and so cease to be a British subject. Women married to British subjects are British subjects, those married to aliens, aliens, but only if by marriage these obtain their husband's nationality. But, if a man during the marriage changes his nationality from British, his wife may declare her desire to retain British nationality, and, unless she obtains her husband's new nationality, retains it in any case. Further, if her alien husband is a subject of a State at war with the Crown, she may resume British nationality. If a naturalised British subject has his naturalisation revoked, the revocation may in certain cases be extended to the wife and children. As a general rule, if the parent of a minor loses British nationality by declaration of alienage or otherwise (though not by the marriage of a woman to an alien), any minor child, if it acquires foreign nationality by the act of the parent, becomes an alien, but may resume British nationality within one year after majority.

(2) Like rules of nationality are in force throughout the Dominions, the terms of the Imperial Act having been followed by those Dominions which have held it desirable to make it absolutely clear that the provisions of the British Act are applicable to the Dominions. The British Act was intended to provide a code automatically applying to the Empire, save as regards the second part dealing with naturalisation which was subject to Dominion acceptance; but this effect was doubted in some Dominions, and in any

case re-enactment was convenient and harmless. But in 1910 Canada found it necessary to distinguish for immigration purposes between different classes of British subjects and to create Canadian citizens for the purposes of that Act. The provision, as subsequently amended,<sup>1</sup> provides that Canadian citizen means: (i) a person born in Canada who has not become an alien; (ii) a British subject who has Canadian domicile; and (iii) a person naturalised under the laws of Canada who has not become an alien or lost Canadian domicile, together with their wives and children. But the wife or children of Canadian citizens who have never landed in Canada do not acquire citizenship through the husband or father or mother. Domicile is attained by five years' residence in Canada as a permanent home; it is lost by voluntary residence outside Canada with intention to make a permanent home outside Canada; in the case of naturalised persons or non-Canadians a year's residence outside is presumptive proof of loss, and five years' residence conclusive proof. The aim of the measure was primarily to determine what classes of persons were entitled to enter Canada despite the immigration restrictions. It was felt that there must be a time when it was impossible to deport persons who had definitely settled in Canada, and the Act gives effect to this view.

In 1921 a further step was found necessary. The Dominion had decided to accept membership of the organisation of the Permanent Court of International Justice. It was entitled under the Statute of the Court to suggest four candidates for election as judges, but suggestions are limited to not more than two nationals. If Canadians were reckoned as British nationals, only two British subjects could be nominated as candidates; moreover, as Article 10 (2) of the Statute

<sup>1</sup> *Revised Statutes, 1927, c. 93. Cf. Baty, Journ. Comp. Leg. xviii. 195-203.*

Chapter VI. provided that, if two members were elected, both subjects of one member of the League, the senior was alone to be allowed to serve, there would be no chance of any Dominion judge ever sitting. The Canadian Nationals Act, 1921, therefore ascribes Canadian nationality to any British subject who is a Canadian citizen, the wives of such citizens, and children, born out of Canada, whose fathers at the date of birth were Canadian citizens or would have been so if the Act had then existed. But Canadian nationality may be disclaimed by any person who, though born out of Canada, is a Canadian national, and by any person who, though born in Canada, is also by birth or becomes during minority a national of Great Britain or any self-governing Dominion.<sup>1</sup>

The Canadian model is followed by the Union of South Africa, which in the British Nationality in the Union and Naturalisation and Status of Aliens Act, 1926, had defined British nationals. It then, by Act No. 40 of 1927, defined Union nationals to include (i) any person born in the Union who is not an alien or a prohibited immigrant; (ii) any British subject who has lawfully entered the Union and has been there domiciled for two years, while so domiciled; (iii) any naturalised person under the laws of the Union whose entry was legal, and who has been three years domiciled in the Union, while so domiciled, provided he does not become an alien; and (iv) any person, born out of the Union, whose father at his birth was a Union national or would have been a national if the Act had been then in force, and was not in the service of an enemy State, provided that such person would not be a prohibited immigrant. The wife of a Union

<sup>1</sup> *Revised Statutes*, 1927, c. 21. In 1931 Canada legislated to provide that marriage of a woman would not deprive her of nationality where she does not acquire her husband's nationality; see *Speeches and Documents on the British Dominions, 1918-1931*, p. 216.

national has that status; if he loses that status she may declare her retention of it. The wife of a non-national normally loses her Union nationality. Minor children lose nationality with a parent save in the case of a widow's loss of nationality on remarriage, but may recover it on attaining full age. A Union national may declare his renunciation of Union nationality as in the case of Canada.

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In the Irish Free State the constitution contained a curious and very ambiguous provision defining citizenship. It gives, by Article 3, citizenship to every person domiciled within the Free State area when the constitution took effect, if he or either parent were born in Ireland or he had been resident for seven years in the Free State area. But any such person who is a citizen of another State may elect not to accept Irish citizenship. The enactment was to be later supplemented; it was plainly defective, and, though most Irish citizens would also be British subjects, the definition covered some persons born of foreign fathers and Irish mothers like Mr. De Valera. In another respect it was noteworthy, for it made political rights depend on citizenship, thus excluding British subjects not being citizens. This step departed from the Canadian model, and it was only followed by the Union of South Africa in 1931 when it was decided to strengthen the Government by extending the franchise to non-natives on the basis of adult suffrage. By the Status of the Union Act, 1934, the qualification of senators and members of the Assembly was altered to restrict the right to Union nationals.

The promised supplement to Irish legislation was delayed until 1935 and was marked, as we have seen, by a deliberate intention to reduce to a minimum the connection with British nationality. Irish citizens—the term is still preferred, though Irish Nationality appears in the title of the Act and

**Chapter VI.** incidentally in some of its provisions—are increased in numbers by adding to them all persons born in the Free State on or after December 6, 1922, or on ships therein registered, or outside the State before April 10, 1935, if the father was then an Irish citizen. Persons born after April 10, 1935, outside the State obtain citizenship if the father, being a citizen, is in the employment of the State. Otherwise, whether the father is a natural-born or naturalised citizen, the son's birth must be registered within a year in a Northern Ireland births register, or in the foreign births register at Dublin, or in the foreign births entry-book kept at the legation or consulate (if any) in the foreign country of birth, and he must, within a year after age twenty-one, declare his retention of citizenship and renunciation of a foreign citizenship if he possesses it; presumably where no renunciation is possible he still retains Irish citizenship. Moreover, persons born before December 6, 1922, either in Ireland, or of parents one of whom was there born, but who are not citizens under the constitution, by being on April 10, 1935, or by becoming permanently resident in the State, become natural-born citizens. If permanently resident outside and not by naturalisation a citizen of any country, then citizenship may be obtained by registration within a year, in a register of nationals kept at a legation or consulate or in the general register of nationals in Dublin. Permission is given to the children of diplomats or consuls to disclaim Irish citizenship either through paternal action before majority or by their own action thereafter. Naturalisation is at the discretion of the minister, and the applicant must have been resident five years out of nine preceding the application, and one complete year before it. He must be of good character, and intend to reside in the State. Special facilities are provided for women who were citizens but lost

citizenship by a marriage which death has terminated. Naturalisation may also be granted for special services, to remove doubts, and to minors at ministerial discretion on the score of Irish connections. The minor children of a naturalised person become citizens, but may disclaim nationality at age twenty-one. A naturalisation certificate may be revoked at the absolute discretion of the minister, who shall revoke it in certain cases, including the occurrence of war, if a naturalised citizen is a subject of the enemy State. Revocation does not automatically terminate the citizenship of spouse or children. Marriage does not affect *ipso facto* nationality, but an elaborate system is provided by which citizenship may be obtained by a certificate of naturalisation where an alien comes to reside permanently with the spouse being a citizen in the State. Citizenship may be retained by declaration by a citizen married to an alien who intends to live permanently outside the State, otherwise it will be lost at specified periods. Attainment after age twenty-one of a foreign citizenship terminates citizenship. Citizenship rights may be given to other countries by express agreement, or at the discretion of the Executive Council on the basis of like treatment accorded by other countries, but such rights may be limited, and the right to own a ship registered in the State depends on reciprocity. Under this power the people of the Empire have been exempted from the provisions of the Aliens Order, as noted above.

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In addition to these Acts dealing with Dominion nationality, Canada and the Union have enacted the provisions of British nationality, as contained in the Imperial legislation, for Canada and the Union, and there has been legislation of like character in Australia, New Zealand, and Newfoundland, where no local nationality has been created.

**Chapter VI.** It is to be noted that New Zealand<sup>1</sup> and Australia,<sup>2</sup> in legislating on the lines of the Imperial Act of 1933 regarding the nationality of married women, have gone further than the United Kingdom. The point of the enactments is to give within the Dominion limits to a woman, who has lost British nationality by marriage to an alien whose nationality she acquires thereby, the full privileges of a British subject in the Dominion. It is recognised that such a woman is virtually in the position of an alien naturalised in a Dominion but not in agreement with the system of Imperial naturalisation above mentioned. Such an alien is not a British subject in the United Kingdom,<sup>3</sup> though in foreign countries where he has no local nationality he receives British diplomatic protection.

In certain points importance attaches to these definitions of Dominion nationals. They can be used as the basis of the exercise of Dominion diplomatic representation, treaty-making, and the exercise of extra-territorial jurisdiction. Thus Canada can bind her nationals as regards the halibut fishery in the Pacific or in her treaties with France (1933) and Poland (1935), and similarly the Union of South Africa can confine advantages under her treaties to Union nationals and shipping registered in the Union, and the Irish Free State can stipulate for Irish citizens. The United Kingdom, as has been noted, does not take this narrow view, but stipulates for all British subjects and ships whenever it can.<sup>4</sup>

Secondly, nationality might be made the basis of jurisdic-

<sup>1</sup> British Nationality and Status of Aliens in New Zealand Amendment Act, 1935; *J P E*, 1935, pp. 354-7, 666-8.

<sup>2</sup> Nationality Act, 1936 (No. 62), s. 7. For the older Acts see Flounoy and Hudson, *Nationality Laws*, pp. 73-129.

<sup>3</sup> *Markwald, Ex parte, R. v. Francis*, [1918] 1 K.B. 647, *Markwald v. A.-G.*, 130 ff. [1920] 1 Ch. 348.

<sup>4</sup> See pp. 130 ff., *ante*.

tion under the Conflict of Laws, which recognises it as one basis in the case of foreign nationals.<sup>1</sup> Still there is the difficulty in a federation that it is not clear why Alberta, for instance, should have jurisdiction over every Canadian national, though the person concerned might never have been in that province.

(3) The issue of nationality is closely connected with that of the use of a distinctive national flag. The Union Jack is the common flag of all British subjects, while the Merchant Shipping Act, 1894, has so far regulated the use of flags at sea. The normal rule is that armed vessels of oversea territories fly the British blue ensign with the special arms or badge in the fly, and the pendant, but the Dominion navies are authorised to fly beside the Dominion flag at the jack-staff the white ensign at the stern. Merchant ships belonging to British subjects registered in an oversea territory fly the red ensign without badge, unless, as has been done for Canada, Australia, New Zealand, and the Union, this is specially authorised by Admiralty warrant; they may bear other flags with the badge so long as they do not violate Section 73 (2) of the Act of 1894 by suggesting error as to their status. It is now open to the Dominions to regulate the matter as they deem wise under the British Commonwealth Merchant Shipping Agreement of 1931 above mentioned.

For general purposes the adoption of a specific flag was

<sup>1</sup> Cf. Dicey and Keith, *Conflict of Laws* (1932), pp. 35 f., 398, 405 f., 413; Keith, *Zeitschrift für ausländisches und internationales Privatrecht*, 1932, p. 308. The use of nationality for immigration and deportation issues, referred to by the Imperial Conference of 1937, is in fact operative in Canada and the Union, while analogous action is taken in Australia and New Zealand without formal definition of nationality. See p. 117, *ante*. The Conference dealt also with the issue of the nationality of married women. But it could not agree either to (1) making a woman's nationality independent of her husband's, or (2) following the Australian and New Zealand action, and the matter stands over. The Union expressed intention to follow the Imperial Act of 1933 which it had not yet done; Parl. Pap. Cmd. 5482, pp. 27, 28.

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carried out in New Zealand by an Act of 1901, while the Commonwealth adopted by regulation a flag for its military forces and its Government offices. The Irish Free State similarly has by executive order adopted a quite distinctive flag, not, as in the case of the Commonwealth and New Zealand, one based on the Union Jack.<sup>1</sup> In Canada suggestions of a national flag have been received with indifference or opposition for the most part.<sup>2</sup> Newfoundland in 1931 definitely adopted the Union Jack without badge as the national flag of the Dominion.

In the Union the issue aroused bitter disagreement, because it was felt that the proposal was instigated by the republican element in South Africa, which desired thus to abolish the use of the Union Jack. The Labour party, on whose alliance the Government had then to depend for its majority, was divided in sentiment, and the Senate, in the exercise of its power of delay, compelled the carrying over of the issue into a second Parliamentary session. This gave time for reflection and compromise, and an agreed solution was achieved in Act No. 40 of 1927. A new flag was created which may be open to heraldic censure but gratified republican sentiment by including with the Union Jack the old republican flags in miniature in the central of the three stripes of the flag. This is the national flag, but the Union Jack is also a flag of South Africa to denote the association of the Union with the other members of the Commonwealth. Both flags must be flown from the houses of Parliament, the principal Government buildings in the capitals, at Union ports and on Government offices abroad, while the Governor-

<sup>1</sup> The Constitution of Éire, Art. 7, adopts the tricolour of green, white, and orange.

<sup>2</sup> The Union Jack remains the national flag, but the red ensign with Canadian arms is used on the High Commissioner's office in London and the Canadian Legations in the United States, France, and Tokyo.

General in Council may fix the manner in which the flags may be flown on ships on the high seas. There has been some complaint on the mode of carrying out the further power granted to the Government to fix other places in the Union where both flags shall be used, but in the main there is justification for the King's telegram of October 27, 1927, expressing his heartfelt satisfaction at the solution of the flag question, though not so much of the spirit of toleration, conciliation, and good-will then evinced has managed to survive to control the actions of the parties in the Union in the contentious issues which confront them. Happily, throughout the discussions the issue did not arise of restriction on Union legislative power, so that the matter was decided on its merits, and the retention of the Union Jack for a definite purpose was accepted by the Nationalists as a fair way of meeting the concession of the South African party of the right of the Union to have a flag which would continue the memories of the days of the independence of the Transvaal and the Free State. It must, however, be admitted that recent developments have pointed to the desire of the Union Government to eliminate the use of the Union Jack as also that of the National Anthem, and it seems clear that, except in Natal and for definitely restricted purposes, elsewhere the use of the Union Jack is rare.

The position of the Governor-General in the Dominions as representative of the King has been recognised by acceding him a special flag of his own, the form of which was agreed upon with the Dominion Governments. The use thereon of the so-called English Royal Crest has been the subject of remonstrance in Scotland,<sup>1</sup> but it is pointed out that it is really the crest which appears in the design of the

<sup>1</sup> See the governmental apologia, *The Scotsman*, April 19, 1937. New Zealand retains the ordinary flag.

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royal arms for the United Kingdom as prescribed by Order in Council, November 5, 1800.

(4) It is in keeping with the existence of national sentiment in the Dominions that special provision should be made as to the use of language. In Canada in the British North America Act, 1867, s. 133, provision is made that either English or French may be used in the debates of the Parliament of the Dominion and the legislature of Quebec; both languages shall be used in the respective records and journals, and either may be used by any person or in any pleading or process in any court of Canada established under the Act and in any Quebec court. The Acts of the federal Parliament and of Quebec shall be printed in both languages. In the other provinces French is not, by the Act of 1867, given an official position.<sup>1</sup> On the other hand, the utmost duplication prevails in the federation, and complaints have been made at times of efforts to enforce bilingualism on federal employees; for example on the railways. At any rate there is no doubt that French receives in the fullest measure the recognition it is promised, and French ranks with English as a qualification for naturalisation.

In the Union the South Africa Act, s. 137, provides that both the English and Dutch languages shall be official languages of the Union and shall be treated on a footing of equality and possess and enjoy equal freedom, rights, and privileges. All records, journals, and proceedings of Parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages. This enactment has been literally followed, and greatly

<sup>1</sup> See Taylor, *Can. Bar Review*, ix. 277-83, as to the language of the courts of Saskatchewan. The bilingual printing of the notes of the Bank of Canada was challenged, June 16, 1936, but affirmed by a large majority; *J.P.E.*, 1936, pp. 765 ff.

strengthened by legislation of 1923, which imposes bilingualism on public servants, with the result of rapidly strengthening the Dutch element in those services. As Dutch proper is far removed from the patois of the Union, it was wisely provided in 1925 that it should include Afrikaans, and determined and successful efforts are being made, as a matter of Nationalist policy, to secure the elevation of that speech to the rank of a written language of culture. No doubt it is inevitable, but it cannot but be deemed unfortunate that British South Africans should have to spend so much time in endeavouring to acquire a speech of so minor a world value.<sup>1</sup>

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In the Irish Free State the constitution by Article 4 provides that the national language is the Irish language, but the English language shall be equally an official language.<sup>2</sup> Special provision may be made by Parliament for districts or areas in which only one language is in general use. This provision would have been usefully included in the Union constitution in view of the conditions of Natal and of many parts of the northern provinces, where only one speech is current. It has been decided by the Irish Governments that Irish must be made the dominant speech, and that practice in the law courts will be denied to those unable to conduct a case in that language. It is therefore unfortunate that the language itself is one largely in the making for use in politics, in law, and in science, and that nothing has been done to relieve it of the reproach of having the worst of all systems of spelling; a committee to reform

<sup>1</sup> The requirement, however, serves effectively to diminish the number of British in the Civil Service, and has practically terminated the former flow of Scottish railwaymen. In country districts also education is controlled to favour Dutch against British.

<sup>2</sup> *O'Foghludha v. McClean*, [1934] I.R. 469; Keith, *Journ. Comp. Leg.* xvii. 120.

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it was wisely set up in May 1937. Moreover, to encourage its employment imposes a serious burden on Irish youth by compelling them to spend, on the re-creation of the tongue, time which much more usefully might be spent in acquiring familiarity with one or other of the great European speeches, not to mention English, the speech of so large a section of the Irish race as the Irish Americans. It seems on the whole that it is delusive to suppose that nationality must demand a distinct speech, but Ireland can hardly be blamed for succumbing to a tendency which has rejuvenated moribund tongues all over Europe. Necessarily efforts are being made to supply Irish speakers with literature, as inevitably children tend to read English, and it is not seriously supposed by Irish statesmen that they can ever destroy the use of English. One unfortunate fact is involved in the position. Just as compulsory Afrikaans has hampered the growth in Southern Rhodesia of any tendency to union with the Union of South Africa, so the Irish language appears to be a fatal barrier to closer relations with Northern Ireland. When the grave effect of differences in speech in preventing mutual comprehension between peoples is borne in mind, it becomes difficult to deny that the deliberate rejuvenation of Irish is a factor of an unsatisfactory character. The use of Afrikaans in the Union cannot be regarded as in any way parallel, for it is the elevation to a higher status of a speech which had been degraded by mere vernacular use in close contact with natives. It would have been absurd to expect the Dutch elements to abandon their home speech for English,<sup>1</sup> and to relieve them of the burden of seeking to reproduce Dutch proper is a statesmanlike action, however regrettable is the use of the language question to lessen the prospects of the

<sup>1</sup> About sixty per cent of the European population is bilingual, and the rest fairly evenly divided.

British elements in the Union. It may be added that there is no evidence of value in favour of the doctrine that compulsory bilingualism is of intellectual or cultural value. Anything that adds seriously to the burdens of study in youth is *prima facie* bad.

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The Constitution of Éire makes Irish as the national language the first official language, recognises English as a second, allows provision for the exclusive employment of one or the other for one or more official purposes in defined areas, and, rather absurdly, makes (Article 63) the Irish text of the constitution, which is a mere translation from the English, made laboriously and slowly, the decisive text in case of variation.

## CHAPTER VII

### THE GOVERNMENTS—THE CROWN AND ITS REPRESENTATION

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VII Of the work of government in the Dominions much is inevitably assigned to local bodies and subordinate officers of many kinds, but the supreme direction is vested in the Crown. The functions of the Crown are performed in part by the King personally, in part by the Governor; in both cases the advice of the ministry is the governing factor, and the ministers who direct the affairs of the State are aided by the Civil Service.

(1) As is expressly declared in the British North America Act, 1867, s. 9, the Commonwealth Constitution, s. 61, originally the Irish Free State Constitution, Article 51, and the South Africa Act, 1909, s. 8, the executive government of each territory is vested in the King. But the Union alone expressly provides that the government may be administered *by the King in person*. In practice, of course, it is necessary that the executive government should be exercised by a local representative of the Crown, and thus the activity of the King is restricted to a few definite subjects, in the main connected with external affairs. In internal affairs, in addition to the appointment of the Governor-General, the King possesses, as has been seen, the formal power to assent by Order in Council to reserved Bills of the Dominions and to disallow Acts. These matters as regards the Dominions are now regulated by the decision of the Imperial Conference

of 1930. The advice of the Dominion ministries must guide the King, despite the necessity of the formal use of procedure by Order in Council. There has already been noted the assertion of General Smuts that, despite the advice of a ministry in the Dominion, the King could not constitutionally assent to a reserved Bill to sever the connection of the Crown with the Dominion.<sup>1</sup> This contention may doubtless be accepted as correct; the resolutions of the Imperial Conference do not touch on such a contingency, and for a ministry to tender such advice would be revolutionary and could properly be met by the refusal of the Crown to misuse a power which was never granted for that purpose.

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In the case of the Australian States the position remains that both reservation and disallowance remain in the power of the Imperial Government to control, and that the King is still advised in these matters by that Government, pending any possible extension of the Dominion system to the States.

(The King acts also on the final responsibility of the Imperial Government in regard to honours for residents in the Dominions, the function of Dominion and State ministries being confined to recommendations. As pointed out above, this rests on the Imperial character of such rewards.<sup>2</sup>

Formal recognition of the new position of the King as advised direct by ministers has been given in various ways in internal issues. For example, in 1932 at the opening of the new buildings of the Union of South Africa in London the King had in waiting, not the Home Secretary as usual at

<sup>1</sup> Keith, *War Government of the British Dominions*, p. 168. No doubt now such a Bill would simply be assented to by the Governor-General and not reserved. For the abolition of reservation in the Irish Free State and the Union, see p. 68 *ante*.

<sup>2</sup> Local prerogative honours are contemplated in the Union, see Chapter XIX, *post*.

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British functions of official character, but a representative of the Union of South Africa.<sup>1</sup> In like manner, when the King went to France in connection with the dedication of the Canadian War Memorial in 1936, he went under the auspices of the Canadian Prime Minister, not a British minister.

On the same principle, submissions to the King from the Dominions may go direct when desired. Thus General Hertzog sent direct his submission asking for the royal assent to the very important Status of the Union Act, 1934. In the case of the abdication of Edward VIII. there was in part direct communication with the sovereign,<sup>1</sup> as later with the new King encouraging him on the occasion of his assumption of a difficult throne. There were also, of course, direct communications between the Prime Ministers of the Commonwealth.

When British instruments are used at Dominion request, various modes indicate Dominion initiative. The signature of the commission of the Governor-General by the Dominion minister responsible explains why the signet, a British seal, has been used. In the royal letters patent of September 25, 1935, regarding the grant of permission to the Governor-General of Canada to retain his authority while on a temporary visit to the United States, such as that of 1937, there is, of course, no mention of Canadian authority, but it is recorded that the instrument was issued under sign-manual warrant pursuant to the advice of His Majesty's Government in Canada, as was the case with the original letters patent of 1931. In September 1936 was inaugurated a remarkable practice in the Union of South Africa which caused much feeling but has deliberately been stereotyped by the Union Government. The King is toasted first as for the Union with the Union National Anthem, and later

<sup>1</sup> Australia, Dec. 5; Union of South Africa, Dec. 6; Canada, Dec. 8, 1936.

among foreign sovereigns with the British National Anthem.<sup>1</sup> It is not surprising that the Dominion party in the Union should regard this action as deliberately provocative and symbolic of the intention to assert the divisibility of the Crowns.

In external issues the King acts in the main personally. The delegation of the royal prerogative to the Governor-General has not been extended to the extent of granting such a fundamental prerogative as that of declaring war or neutrality or making peace, nor is even the power of making commercial treaties conceded. In the case of war or neutrality it is easy to see that the special character of such action which still is performed for the whole Empire dominates the situation, but there is nothing essentially necessary in the withholding of the power to conclude commercial treaties and minor engagements. Again there is no delegation of the power to accredit envoys to foreign States, though the Governor-General is empowered to receive foreign envoys appointed to the Dominion, a procedure inevitable of course on practical grounds. In these matters of foreign relations it has been the practice for the King to act on the formal advice of a British minister, and issues of war or neutrality still are decided on the final authority of the British Cabinet. In the minor matters of international intercourse the procedure adopted by most of the Dominions<sup>2</sup> employs the formal assistance of a British minister, though the real advice is that of the Dominion. But, as has been seen, the Irish Free State and the Union of South Africa have eliminated even the formal participation of any British minister, and each has, with the permission of the

<sup>1</sup> The abolition of the use of the National Anthem is intended by Senator Hertzog in favour of an Afrikaans Anthem (April 5, 1937)

<sup>2</sup> For Canada's view in 1929 see Keith, *Journ. Comp. Leg.* xii. 100.

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A point of great importance arises from the new departure. Under the older form of action the British Government was necessarily informed of the wishes of the Dominion, so that the resolutions of the Imperial Conferences of 1923, 1926, and 1930 enjoining such information were automatically complied with. Under the new procedure, while the obligation of prior communication of the intention to negotiate is unimpaired, it remains possible for a Dominion which uses the Irish Free State procedure to submit to the King action which might be injurious to British interests. It is clear that the position of the King in these matters is of peculiar delicacy. But it is obvious that it is incumbent on his private secretary to secure that the British Government has been informed by the Dominion of the proposed action so that it may be in a position to offer observations to that Dominion if it thinks it desirable. If the Dominion, after discussion, persists in desiring certain action, a grave position might arise, for it would be very distasteful to the King to assent to Dominion action in the face of the knowledge that the British Government deprecated the proposed step.<sup>1</sup> It was claimed by Mr. McGilligan in 1931<sup>2</sup> that in such a case the King must act as desired by the Dominion, and it is clear that, if he refused to do so, a crisis might arise. On the other hand, the King's position in the United Kingdom would be seriously affected by assent to action aimed at Imperial interests, such as an Irish or a Union treaty of commerce giving marked preferences to the detriment of British goods to some foreign power. For the King to refuse ratification in such a case on the advice of

<sup>1</sup> Keith, *op. cit.* xii. 255; *The Sovereignty of the British Dominions*, pp. xvii, xviii.

<sup>2</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 247-9. As to Ethiopia (1937-8), see Preface.

British ministers would be a negation of the doctrine of equality, and any action must be taken on his own responsibility, which again runs counter to the doctrine that royal action should, save in the most abnormal conditions, be based on ministerial advice. The proper mode of resolving such a conflict would clearly be the advice of the Imperial Conference to the disputants, but there is no way of compelling any Dominion to wait for or to accept such advice, and the only conclusion possible is that normally assent would be necessary, it being made clear that the King had finally acted merely on the advice of the Dominion. In the highest issues of war or neutrality it has already been said that the time has not yet come when the right of a Dominion to insist on having its own way in either issue has been conceded. To declare war or make peace or assert neutrality separately from the rest of the Empire would virtually be an act of secession, and the preamble of the Statute of Westminster, 1931, is a definite assertion by all the Dominions as well as by the United Kingdom that that issue is not one to be dealt with by isolated action.

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The issue, of course, might arise in a minor form. A Dominion might desire diplomatic representation in some country where for special reasons division of British representation was undesirable. In such a case the British Government might use its influence with the foreign power to make it difficult for the project to be carried into effect, but it is clear from the resolutions of the Conference of 1930 that the British Government is prepared to further Dominion desires for distinct representation when that is desired.

Certain other prerogatives of the Crown have never been delegated, but are now obsolete, such as the coinage prerogative, having regard to Dominion legislation covering

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As we have seen, it does not rest with any Dominion to deal in isolation with the succession to the throne or the royal style and titles. So far the expense of the Crown has been defrayed entirely by the United Kingdom. The new position of the Crown as regards the Dominions has evoked the logical suggestion that part of the cost should be defrayed from Dominion funds, but it is unlikely that this suggestion will mature into action at any early date, and in 1937 it was specifically intimated that no British suggestion would be made.

(2) The actual control of the functions of executive government normally rests with the Governor-General, styled Governor in Newfoundland, and with the Governors of the Australian States and the Lieutenant-Governors of the Canadian provinces. In the case of the Governors-General and Governors the appointment is made direct by the King,

<sup>1</sup> Until 1931, under Imperial legislation, the Coinage Act, 1870, an Ottawa branch of the Royal Mint was retained in Canada, but then was discontinued, Dominion legislation superseding it. The Australian and Union branches still exist, the Union providing by legislation (Act No. 45 of 1919) for British final control. New Zealand has its own coinage under Act No. 12 of 1933.

<sup>2</sup> By Order in Council, July 31, 1880 Canada was given the territories of the Crown in the north. It was relied on to secure the Sverdrup group in 1930; *Canadian Annual Review*, 1930-31, pp. 364, 365.

<sup>3</sup> The Australian Antarctic Territory and the Ross Dependency.

in that of the Lieutenant-Governors by the Governors-General of Canada on the advice of his ministers.

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Prior to 1922 the selection of officers was made by the King on the advice of the British Government, which consulted the Government of the territory concerned, and allowed it to negative any proposed appointment. In that year the Irish Free State insisted effectively on securing the selection of its own nominee, Mr. T. Healy, as Governor-General, a precedent followed in the selection in 1928 of Mr. James McNeill. The Imperial Conference of 1930 conceded the Dominion right of choice, which was followed by the appointment of Sir Isaac Isaacs as Governor-General of the Commonwealth despite his great age and the objections of the opposition, and by the selection by Canada with general approval of Lord Bessborough as Governor-General. Canada, like the Union up to 1935, which had also secured its own way in the matter, is opposed to the selection of local men, on the sound ground that accusations of partisanship are inevitable as was shown in the Australian case. Where, as in the Union, racial feeling runs high, such a selection is specially open to difficulty, and the selection of a party politician in 1936 was disliked even by many ministerialists.<sup>1</sup> In the provinces Canadians naturally are regularly selected, but the office is of less consequence, and even so instances have occurred in which it has been necessary to remove Lieutenant-Governors before the expiry of the normal term of office, five years, on the score of partisanship.

In Australia the States have repeatedly raised the question of appointment of local men.<sup>2</sup> No agreement has ever

<sup>1</sup> Lord Clarendon's term of office was rather abruptly cut short after extension. It was asserted that he had offended General Hertzog by disliking the new system of toasting the King twice. Cf. Keith, *Journ Comp Leg.* xix. 118.

<sup>2</sup> See Parl. Pap. Cmd. 2683 (1926).

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been reached among the States or even consistently by any State Government. But there is obviously serious risk of partiality in local selections. What might happen is shown by what has happened when the Governor has been absent and the government has been in the hands of local men acting in their place. In 1920 the acting Governor of Queensland, a Labour nominee, swamped unconstitutionally the Legislative Council of Queensland in order to secure the passage of legislation of a confiscatory character. In 1924 an acting Governor of Tasmania assented, quite illegally, to a Bill passed by one house only in flat defiance of his duty to preserve the law.<sup>1</sup> In 1932 a grave conflict between the Commonwealth and the State in New South Wales was avoided only by the action of the Governor in dismissing the ministry when it defied the law; such action would have been impossible for a local nominee if appointed by the Labour Government in question.<sup>2</sup> It is an additional objection to local selection that the Governor in the States still has Imperial duties to perform in the shape of the reservation of State Bills under the royal instructions, and still acts as an agent of the Imperial Government in addition to his normal function as constitutional head of the State.

Provision for the case of vacancy in the office of Governor is regularly made; to avoid partisanship the Chief Justice is normally selected, but not invariably; the Lieutenant-Governor who swamped the Queensland Council had been a Labour politician. In the case of the Commonwealth the senior Governor of New South Wales or Victoria usually is appointed to act. In case of temporary absence and for other purposes the power to appoint deputies is accorded,

<sup>1</sup> Keith, *Letters on Current Imperial and International Problems, 1935-1936*, pp. 86, 87.

<sup>2</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 282-9.

now usually by statute, but also by prerogative, and is freely exercised, especially in the federations, for specific purposes. The salaries and expenses of the Governors-General and Governors are defrayed from local funds; Canada is the most generous, salary £10,000, maintaining a semi-regal state and imitating the forms of the British Court in some respects; at its request the Governor-General has been received in Washington on a ceremonial visit with the same respect as would be accorded to the King himself, and in 1937 his meeting with the President was treated as an outstanding event.

The office of Governor-General is constituted by letters patent under the Great Seal, accompanied by instructions under the royal sign manual and signet, while the actual appointment is made by commission under the sign manual and signet.<sup>1</sup> The commission of Sir Isaac Isaacs was countersigned by Mr. Scullin, as the formal mode of expressing the fact that the appointment was advised by that minister. In the case of the States the instruments clearly are still necessary; in the case of the Dominions the instructions are now obsolescent and the procedure may be revised. But it is necessary to make it clear that the King delegates to the Governor-General the prerogative in so far as that is proper for exercise in a Dominion. This issue unquestionably has been affected by the progress of Dominion autonomy. Formerly the extent of the delegation of the prerogative in the case of the Dominions had to be judged on the basis of their subordinate position; now that equality of status has been asserted, it may be argued that *prima facie* every royal prerogative has by necessary intendment passed to the

<sup>1</sup> For the Union of South Africa in 1937 its own signet was used as for the Irish Free State in 1932, and new letters patent and instructions will bear the royal Great Seal and signet respectively.

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This position clearly dominated the attitude of the Canadian Government in 1931 when it obtained a revision of the letters patent creating the office of Governor-General and of the royal instructions. Its action was in precise accord with the Imperial Conference resolution of 1930 regarding the position of Governor-General, and what is noteworthy is the limited amount of change desired. Letters patent were still issued under the Great Seal of the Realm, not under the Dominion seal, necessitating the intervention of a sign manual warrant, countersigned by a British minister, though the warrant innovated by stating that proceedings were being taken at the request of and on the responsibility of the Prime Minister of Canada. No reference is now included as in the former instrument to the possibility of instructions being given by the King by Order in Council or through a Secretary of State,<sup>1</sup> and leave of absence to the Governor-General now is to be given through the Prime Minister of the Dominion and not through a Secretary of State. In essentials, however, the old form remains, and

<sup>1</sup> Instructions can be given under the sign manual and signet, which would involve formal British action.

there is no attempt to increase the delegation of the prerogative. Indeed it is still enjoined that in the exercise of the prerogative of mercy the Governor-General, in any case where pardon or reprieve might affect the interests of the Empire or any place outside Canadian jurisdiction, shall take these interests into his personal consideration in conjunction with the advice of ministers. This retention of a quite obsolete rule is wholly unintelhgible on principle, and most embarrassing to the Governor-General if he attempted to act upon it. Yet it has the latest ministerial sanction, and the comedy is evolved of the Governor-General being required by ministers to disregard on his personal responsibility their own advice on an issue of government. The point is chiefly of value as a reminder of the fact that even the Crown in the United Kingdom is not merely an instrument in ministerial hands.

It remains, therefore, even under the latest model, to determine by usage and legal decision, unless as in the case of the foreshore and bed of the sea the matter is dealt with by legislation, as in the Union Act No. 21 of 1935, what prerogatives can be exercised by the Governor-General or Governor when they are not specially delegated. The rule that a Governor<sup>1</sup> is not a Viceroy is established law, for the case of *Musgrave v. Pulido*,<sup>2</sup> though decided as regards a Crown Colony, is of general application, and its validity is not open to question. What may be debated is the extent to which by constitutional usage and the resolutions of the Imperial Conference, coupled with the Statute of Westminster, 1931, the delegation may be assumed to have developed. Thus at one time it was assumed to be certain that the Governor without special delegation had no power

<sup>1</sup> The term is conveniently used to cover Governor-General.

<sup>2</sup> (1879) 5 App. Cas. 102.

Chapter VII. to grant a charter of incorporation, but the Privy Council most unexpectedly ruled that even the Lieutenant-Governors of Canada had a delegation tacitly of this authority.<sup>1</sup> There is no evidence that the coinage prerogative passes to a Governor, and the issue in view of legislation is never likely to arise. The Governor has no right to award honours, and when he holds investitures it is by special authority from the King. Far more important is his inability—except by statute of 1934 in the Union of South Africa—to declare war, make peace, or declare neutrality or conclude treaties or ratify them in cases where, as is normal, compacts are made in the names of sovereigns. Where, on the other hand, they are made in the name of Governments, the Governor in Council is the normal authority for ratification. Nor so far has the Governor-General been authorised to accredit envoys to other powers, though he in Council is the authority under which delegates from the Dominion to the League Council and Assembly perform their functions. The position is clearly complex and unstable.

How far in time of war the minor royal prerogatives can be assumed to pass to the Governor-General is uncertain. In the Australian case, *Joseph v. Colonial Treasurer of New South Wales*,<sup>2</sup> the issue was raised whether action taken by the State under the Wheat Pool scheme infringing private rights could be justified under the war prerogative, which it was suggested was being exercised by the State Government under delegation from the Governor-General of the Commonwealth. The contention ultimately failed to convince the High Court, which was clearly of opinion that, if the alleged war prerogative could be exercised in such a

<sup>1</sup> *Bonanza Creek Gold Mining Co v. The King*, [1916] 1 A.C. 586. At pp 586, 587 the doctrine of *Musgrave v. Pulido* is evidently reaffirmed.

<sup>2</sup> (1918) 25 C.L.R. 32.

way in Australia without special delegation from the Crown, it could only be exercised by the Governor-General, and could not be delegated in such a way as to validate the action taken in the case before the Court. A definite opinion in favour of the possession by the Governor-General of Canada of some measure of delegation can be found in Sir R. Borden's contention<sup>1</sup> in 1917 that it rested with the Dominion Government, and not the British Government, to decide as to the propriety of the requisitioning in the United Kingdom of Canadian registered shipping. This implies that, had the shipping been physically present in Canada, it could have been requisitioned under governmental authority there at the discretion of the Dominion Government. Naturally the British Government relied on the fact that the shipping was British, though of Canadian registry.

In certain matters the issue as to the extent of the delegation necessarily implied has been evaded by the grant in advance of authority to Governors-General as in the case of war emergencies. So also the constant grant of the prerogative of pardon, maintained still in the Canadian instruments of 1931, disposes of that issue; in the case of the provinces the Supreme Court of Canada<sup>2</sup> has ruled that, while the legislatures can properly confer power to pardon offences against provincial legislation, as in fact they have done, the power was not implicit in the office of Lieutenant-Governor representing the Crown. So again delegation of the power to keep the seal of the Dominion or other territory disposes of an issue which otherwise, as a long controversy in Canada shows, has elicited much variety of judicial opinion. On the other hand, it is clear that the appointment of King's

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<sup>1</sup> *Canadian Constitutional Studies*, pp 12, 122

<sup>2</sup> *A.-G. for Canada v. A.-G. for Ontario*, 23 S.C.R. 458.

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In some respects it may be assumed that since the Statute of Westminster the powers of Governors-General are extended. Thus, while it is clear law that a Dominion Government is capable of excluding an alien from British territory<sup>2</sup> as a matter of common law, it would appear that the Governor-General should now be deemed to have the power to authorise an act of state committed on a foreigner beyond the territorial limits of the Dominion, though the issue permits of doubt.

The fact that the Governor-General or Governor is not a Viceroy renders his position from the legal point of view anomalous. There is abundant authority that at present even a Governor-General is liable in the courts of the territory both civilly and criminally for any acts done in his private or his public capacity if these acts are illegal. In the United Kingdom he is subject to liability on contract or tort, and despite the normal rule of the local character of criminal jurisdiction, two Imperial Acts<sup>3</sup> are definitely aimed at punishing crime or misdemeanour by colonial Governors. Moreover, a Governor might be brought under the terms of the Imperial Act of 1861 punishing murder committed overseas by any British subject. There are strong reasons why this legal liability for official actions should be wiped out, and that complete immunity in the United Kingdom and in the territory alike should be ac-

<sup>1</sup> *A.-G. for Dominion of Canada v. A.-G. for Ontario*, [1898] A.C. 247.

<sup>2</sup> *Musgrave v. Chun Teeong Toy*, [1891] A.C. 272.

<sup>3</sup> 11 & 12 Will. 3, c. 12; 42 Geo. 3, c. 85.

corded just as it is enjoyed by the Crown.<sup>1</sup> This might no doubt be brought about by judicial legislative decision, based on the new status of Governors-General under the Imperial Conference resolutions of 1926–30, but these do not apply to State Governors or provincial Lieutenant-Governors, who also deserve protection. The matter fortunately is not of high importance, and, while the Imperial Acts clearly are not within the power of the Dominions to repeal under Section 2 of the Statute of Westminster, the effort to make use of them to bring to justice a Governor of Natal for permitting the exercise of martial law and the execution of natives proved a fiasco.<sup>2</sup>

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In matters of contract for governmental purposes the Governor is exempt from personal liability by reason of the general rule that as a servant of the Crown he cannot be supposed to bind himself. But on the same ground he cannot permit the bringing of petition of right against the Crown, for he has no delegation of that power. Fortunately the necessity of securing the royal authority is obsolete, as local legislation normally makes full provision for dealing with alleged breach of contract by the Government. But in theory in any territory subject to the English common law, where the ground is not so covered by statute as to exclude the operation of the prerogative, it seems clear that the King could authorise the bringing in the local courts of a petition of right in respect of any matter which under English law could justify the bringing of such a petition. It is clear also that a claim cannot be brought in the English courts in respect of an obligation of the Crown in respect of some territory outside the United Kingdom, such as the

<sup>1</sup> It is given to the Governor-General, the Governors of the Indian provinces, and the Secretary of State by the Government of India Act, 1935, s. 306, and to the Governor of Burma by the Government of Burma Act, 1935, s. 152.

<sup>2</sup> Keith, *Responsible Government in the Dominions* (ed. 1928), i. 97.

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Irish Free State.<sup>1</sup> By analogy, under Dominion legislation no claim against the Crown in its Imperial capacity could be dealt with in a Dominion court in such a manner as to impose a liability which could be recognised by the Crown in the United Kingdom.

The liability of the Governor in tort is rendered of minor importance in normal circumstances by the rule that, when an official action is tortious, responsibility for it lies neither on the Crown, which can do no wrong, nor on the official superior of the tort-feasor,<sup>2</sup> unless it can be proved that he identified himself with the wrong committed. Hence normally an official act regarded as tortious would result in proceedings against a minister or inferior officer, not against the Governor personally. In a certain number of cases Dominion and State legislation has placed responsibility for tort<sup>3</sup> on the Government in substitution for the British practice, under which the Government pays the expenses and damages, if any, awarded against an officer who acted in execution of supposed official duty, but the liability of the Crown in such cases is neither complete nor wholly satisfactory to enforce.

(3) The prerogative power of the Crown, though exercised by the Governor, is in the same position as regards ministers as statutory authority. Statutes vary greatly in the mode in which they distribute power. Ministers individually may be

<sup>1</sup> *A.-G. v. Great Southern and Western Ry Co.*, [1925] A.C. 754; Dicey and Keith, *Conflict of Laws* (1932), p. 205. There is an exception as regards loans raised in England and given trustee status by the Colonial Stock Acts, 1877-1934, see 40 & 41 Vict. c. 59, s. 20; Treasury Order, Dec. 6, 1900.

<sup>2</sup> *Carolan v. Minister for Defence*, [1927] I.R. 62.

<sup>3</sup> *Robinson v. South Australia State*, [1929] A.C. 469; *Commonwealth v. New South Wales* (1923), 32 C.L.R. 200, for Canada, Exchequer Court Act (R.S.C. 1927, c. 34), *Capon v. R.*, [1933] Ex.C.R. 54, for the Union, Crown Liabilities Act, No. 1 of 1910, *Union Government v. Thorne*, [1930] A.D. 47, Chapter XI (2), *post*.

authorised to do certain things, or boards, or officers, and it is only more important issues that are ascribed to the Governor or the Governor in Council. In some cases, as in those of the Commonwealth of Australia, Tasmania, and the Union of South Africa, the Governor-General or Governor in statutes is defined to mean that officer acting with the Executive Council. But in all cases alike the principle prevails that for official actions the Governor must under normal circumstances act on the advice of his ministry or of an individual minister, according as the case demands.<sup>1</sup> The duty of acting, it must be noted, is a legal duty, but one of imperfect obligation. Even when a statute imposes on a Governor an express obligation, as opposed to merely authorising action as is the more normal course to take, it is clear that his action cannot be enforced by mandamus by the courts. This was decided as regards the Governor of South Australia<sup>2</sup> by the High Court of the Commonwealth when an effort was made to secure the issue of a mandamus to the Governor to issue a writ for an election of a Senator for the State. It was ruled that it had never been held that mandamus lay to compel a Governor to issue a writ for State elections, and that it was impossible to make a precedent. The Governor could not act without the aid of his ministry, and it might not be willing to have the vacancy filled. The same court<sup>3</sup> ruled that no mandamus lay to the Governor in Council of Victoria to compel him to consider the claim of a convict to release under prison regulations. There is clearly sound reason for these and other rulings. It

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<sup>1</sup> So the Privy Council in the Irish Boundary Reference, Cmd. 2214. That the Governor-General has no discretion where statutory power is given to the Governor-General in Council is laid down in *Schierhout v. Union Govt*, [1927] A.D. 94. See also *Buckley v. Edwards*, [1892] A.C. 387

<sup>2</sup> *R. v. Governor of South Australia* (1907), 4 C.L.R. 1497.

<sup>3</sup> *Horwitz v. Connor* (1908), 6 C.L.R. 38.

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is not for the courts to seek to control the highest form of executive authority, though in certain cases, as in the United Kingdom, mandamus may be issued to officials of inferior status to compel them to perform definite duties owed to individuals as opposed to public functions.

The rule of action on ministerial advice applies equally to statutory duties imposed on Governors by Imperial Acts, such as the functions imposed by the Pacific Islanders' Protection Acts. So also while a prosecution of an alien for criminal acts done in territorial waters requires under the Imperial Act of 1878 the authority of the Governor, in granting it he would act on ministerial advice; in fact the exercise of authority seems to take place without special reference to that Act, which may merely have reinforced the common law.

The necessity of acting on ministerial advice does not preclude, of course, the right to discuss and advise. It is essential that the Governor shall be given his due place; it is illegal to assume that he will assent, and action based on the assumption so that his formal concurrence has not been given is invalid.<sup>1</sup> The ministry advises either as individual members, or when the law so requires and in important issues, as the Executive Council. Normally matters are passed formally in Council where, except in Canada, the Governor is normally present in person, but any issue of importance must be explained to the Governor in advance, and similarly ministers must explain any issue on which information may be requested. The Imperial Conference of 1926, in insisting on the position of the Governors-General as parallel to that of the King, stressed the necessity of ministers affording that officer the same treatment as regards consultation and information as is accorded to His Majesty.

<sup>1</sup> *Mackay v. A.-G. for British Columbia*, [1922] A.C. 457.

No doubt it is difficult to insist on complete effectiveness of this rule, but there are many instances of its observation on record, and there is no doubt of the right of the Governor-General to demand strict observance of it. It is significant that in the Irish Free State, where the determination to exclude any royal intervention has been from the first dominant, the practice was to give whenever possible legal powers not to the Governor-General in Council but to the Executive Council itself,<sup>1</sup> a procedure which effectively eliminated the Governor-General from any interference or knowledge of current affairs. It must be added that, if the practice of appointing partisans as Governors-General were adopted in the Dominions, the result might be serious in inducing later ministries to withhold knowledge from the representative of the Crown which would have been gladly given to an impartial appointee, or to insist on changing the Governor-General.

If after discussion the Dominion ministry declines to modify its proposed line of action, there is normally no option for the Governor but to assent, for the responsibility belongs to ministers, not to him. But in certain cases mere assent may be impossible, and in the past there has existed a marked difference between British and Dominion practice as regards the necessity of taking ministerial advice. That a Governor should act on ministerial advice has been admitted in the Dominions, but with an important proviso: a Governor may reject advice if he can secure, in the event of the resignation of the ministry in consequence of his action, a new ministry which will accept responsibility *ex*

<sup>1</sup> Even the power of pardoning offences under the Constitution (Amendment No. 17) Act, 1931 Under the Constitution (Amendment No. 27) Act, 1936 all authority in effect was taken from the Governor-General and no further appointment allowed, and in 1937 the rest of his functions were taken away, and he was pensioned; Executive Powers (Consequential Provisions) Act, 1937.

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*post facto* for his rejection of advice. The doctrine of course is familiar to English politicians, for it is the principle announced by Sir R. Peel<sup>1</sup> as binding on him when he took office under William IV. in the belief that Lord Melbourne had been dismissed, though later research<sup>2</sup> has shown that this belief was an error. While in England this view has almost died out, it was regularly in use in the Dominions and States as regards dissolutions of Parliament. A ministry was not held to have an automatic right to consult the electorate if it asked for a dissolution out of normal course, on the score that it had been defeated or that it was uncertain of being able to carry on the administration effectively without a fresh mandate. It was deemed to be the duty of the Governor to determine, after careful investigation of the position, whether he could not find a new ministry which would carry on the government without a dissolution.<sup>3</sup>

Though this doctrine was well established, and had been applied three times in the first decade of the Commonwealth itself, it happened that in the federation of Canada as opposed to the provinces it had not been tested in practice. A crucial issue therefore arose in 1926 when Lord Byng was asked by Mr. Mackenzie King for a dissolution, at a time when a debate was in progress on the issue of a motion of censure directed against the Government on the score of irregularities in the Customs administration. To Lord Byng the situation presented itself in the light of an effort to avoid a decision on the vote of censure, and he had regard also to the fact that the normal dissolution in 1925 had failed to give the Liberal party a clear lead, so that it had

<sup>1</sup> *Memoirs*, II. 31-3.

<sup>2</sup> Keith, *The King and the Imperial Crown*, pp. 84-6.

<sup>3</sup> Keith, *Imperial Unity and the Dominions*, pp. 85-112.

to rely on the wavering support of the Progressives. It seemed to him, therefore, just to give the Opposition the opportunity of dissolving Parliament and seeking a mandate. In his action he clearly went beyond any relevant precedent. Mr. Mackenzie King was prepared to regard his action as justifiable if he could have secured a ministry able to carry on without a dissolution, but naturally he could not see how it could be fair to refuse to an undefeated Prime Minister a dissolution, and to give it to a new Prime Minister who was unable to avoid a hostile vote in the Commons. Moreover, the Governor-General was compelled to assent to carrying on the Government with a Council composed of acting ministers with the exception of the Prime Minister himself,<sup>1</sup> as the appointment of the others as ministers would have vacated their seats and left the party in a hopeless Parliamentary minority. Very possibly the Governor-General thought that a dissolution could be avoided; if so, he completely miscalculated, and so unconstitutional was his action that the Liberals, by stressing the issue, succeeded in effacing the painful effect of the disclosures of maladministration in the Customs, and in winning a majority which most competent judges held would not have been achieved had a dissolution been given simply to Mr. Mackenzie King. The latter's exposition of constitutional doctrine<sup>2</sup> was justly admired in Canada, and evoked only a feeble and evasive response from Mr. Meighen, who had to argue that the Governor-General had only acted as the King would have done in like circumstances—an impossible thesis.

As noted above, the effect of the episode was seen in the

<sup>1</sup> This action was barely legal; its utterly unconstitutional character was shown by Mr. Mackenzie King, June 30, 1926.

<sup>2</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 149-59; *Letters on Current Imperial and International Problems, 1935-1936*, pp. 84, 85, *Letters on Imperial Relations, 1916-1935*, pp. 56-60, 67-9.

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fact that the Imperial Conference of 1926 stressed the position of the Governor-General as the counterpart of the King, and to emphasise this took away from him the function of agent of the British Government. There is no doubt as to the meaning to be given to this declaration, which, it must be remembered, has no application to the Governors of the States or Lieutenant-Governors of the Provinces. Assimilation of Dominion to British usage in the matter of dissolutions was clearly pointed out, and British usage had been rather remarkably demonstrated in the grant of a dissolution by the King to Mr. R. MacDonald in 1924,<sup>1</sup> despite the opinion of Mr. Asquith that on the defeat of the Labour Government an effort should be made to find a ministry ready to carry on, and avoid a fresh dissolution of Parliament so soon after the election of 1923. The matter was early put to the test in the Commonwealth of Australia, where precedent had asserted the right to refuse a dissolution; though on the other hand in 1914 the Governor-General had followed the British practice and had given a dissolution to a ministry which might probably have been easily replaced without such action. Mr. Bruce in 1929, being defeated by the revolt of a section of his followers, instigated by Mr. Hughes on the issue of the abandonment of the federal system of conciliation and arbitration, asked for a dissolution on the strength of the principle asserted at the Conference of 1926, and was accorded it. The precedent was deliberately followed with special stress on Lord Byng's case and the opinions of the writer by Sir Isaac Isaacs in 1931,<sup>2</sup> when on a defeat in the lower house Mr. Scullin advised a dissolution.

It is, of course, too much to say that the Governor must

<sup>1</sup> Keith, *The King and the Imperial Crown*, pp. 170, 171.

<sup>2</sup> *Commonwealth Parl. Debates*, cxxxii. 1926.

grant a dissolution inevitably on a request from his Government. It is obvious that only one dissolution can be asked for by the same ministry within a limited period; if it fails to secure a majority at a dissolution, it cannot imitate Continental practice and endeavour to secure a complacent legislature by a series of dissolutions. The King in a like case would clearly be compelled to refuse dissolution, and would then find a new Government to support his action. But it may be hoped that neither in the Dominions nor the United Kingdom will any Government venture to disregard the result of an election. If a ministry at an election secures only a slight majority and after a substantial period<sup>1</sup> seeks again a dissolution, the issue would be different and must be decided according to circumstance. Absolute rigidity is impracticable, especially in the case of such a Dominion as Newfoundland, where constitutional usage is far from settled on normal lines. What is clear is that it is always advantageous to grant a dissolution where that will clear up issues. Thus in 1924 the Governor of Newfoundland gave a dissolution, despite strong objections by the Opposition, to the Premier, and this resulted in the effective assertion of the will of the electorate in choosing a new Government, thus terminating the confusion prevailing. In 1932 fresh trouble developed in that Dominion, accompanied by rioting on such a scale as to compel the temporary absence from the capital of the Premier, and it was only on a dissolution that a clear decision was reached, rejecting utterly Sir R. Squires as head of the Government.

While the States of Australia and the Canadian provinces are not subject to the rule laid down in 1926, it is clear that practice there tends to be assimilated to that in the

<sup>1</sup> The issue arose in the Canadian struggle of 1926, there having been a rather inconclusive election in 1925.

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Dissolutions, of course, are not the only matters in which the Governor may have difficulty in deciding whether to act on the advice of ministers. The situation becomes very difficult when a ministry is defeated at an election but holds office pending the decision of Parliament. Such a course is perfectly legitimate, but the ministry is bound in fairness to perform only routine tasks and not to fetter its successor. If it seeks to do more, it may become the duty of the Governor to refuse its advice, as did Lord Aberdeen in Canada in 1896 when he practically forced Sir C. Tupper's resignation by rejecting his advice as to appointments and contracts, after his defeat at the election was certain. In this regard, however, modern practice points to neutrality on the part of the Governor-General; after the defeat of Sir J. Ward in 1911, the Governor-General made no effort to press for the clearing-up of the position, which was one of deadlock. In the difficult conditions of 1923–4 in Newfoundland and again in 1932, the Governor refrained from any striking action, contenting himself with moderate pressure to bring about the observance of constitutional principles. How far a Governor-General should acquiesce in action by

his ministry which is high-handed and irregular was hotly discussed in Australia during the Great War,<sup>1</sup> when on two occasions Mr. Hughes effected ministerial changes in a drastic manner, but the Governor-General's acceptance of his action, though no doubt partly explained by war conditions, pointed directly in the favour of the principle laid down in 1926. The electorate can after all normally be trusted to give due weight to any irregularities of ministers when they appeal to them at the next election, and in Australia that time is never long delayed.

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A case of great delicacy, however, arises when the ministry with a majority in the Parliament desires to extend the period of its existence. That such a step is legal does not determine the issue. It represents a grave intrusion on the rights of the electors, who chose their representatives for a definite period, and who may have since repented of their decision. After all, it is common knowledge that many elections are decided on chance issues, and do not represent the permanent wishes of the majority. It seems clear, therefore, that in these circumstances a Governor is bound to weigh beside the advice of the ministry the welfare of the territory and their probable wishes. There is little precedent to guide. the action taken in 1916 when the Governor of New South Wales hesitated to agree to the extension of Parliament for a year,<sup>2</sup> and on that among other grounds was recalled from his office, can be explained rather than excused by the anxiety of the British Government to help the ministry of the moment in its effort to co-operate with the federal Government in recruiting for war purposes. It is significant that, though the Imperial Parliament in 1916 extended at the request of Canada the duration of Parliament for a year,

<sup>1</sup> Keith, *War Government of the British Dominions*, pp. 209 ff

<sup>2</sup> *Ibid.* p. 272.

Chapter VII. the existence of strong dissent in the country prevented any request for an extension being brought forward in 1917. There was also in 1932 in New Zealand strenuous opposition because the Government in its efforts to economise decided to extend the life of the existing Parliament by one year. Yet clearly in such a case the Governor-General could not wisely refuse to aid by assenting to the Bill.<sup>1</sup>

Constitutional changes necessarily raise difficulties. Can a Governor assent to action which alters the constitution if there is no very clear mandate from the electorate? In 1892 a ruling of the Secretary of State approved the addition to the upper house of New Zealand of extra members to strengthen the position of the new Liberal Government in that house. Though the upper house was hardly swamped, the precedent was adduced successfully to secure a number of additions to the New South Wales upper house by Admiral de Chair and Sir P. Game.<sup>2</sup> Reluctance to go as far as was desired by the State Premier, Mr. Lang, in both these cases led to embittered attacks from the Premier's party, while, on the other hand, the Opposition held that the Governor had neglected an obvious duty to maintain the upper house as a serious legislative instrument. There can be no question of the excessive number of appointments, which rendered the upper house more numerous than the lower. The added members, however, on each occasion proved disappointing to the Labour party, for they showed no exact obedience to the appointing power, and they did not give the Labour administration the full support of their numbers. An effort to secure the dismissal of the Governor on the score of his refusal to act to the full extent was made

<sup>1</sup> No doubt this step helped the Opposition victory of 1936. See Act. No. 11 of 1932, s. 35 and No. 16 of 1934.

<sup>2</sup> Keith, *Journ. Comp. Leg.* xii. 255-7.

in Admiral de Chair's case, but the Colonial Secretary Chapter VII.  
negatived the suggestion on the ground that the royal instructions expressly contemplated the possibility of the Governor acting against the advice of his ministers. The formal reason is of negligible importance; it is the mere expression of a principle inherent in the position of the Governor or Governor-General, but clearly the refusal was sound. As the result of the election held in 1927 proved, the electorate was far from anxious to see the uncontrolled predominance of the extremist views of Mr. Lang.

On the other hand, in Queensland in 1920 the upper chamber was deliberately swamped by the acting Governor under circumstances which made his action definitely unconstitutional. He was a nominee of the Labour Government and formerly a Labour minister, and his appointment as Lieutenant-Governor was clearly improper, since necessarily he was a partisan. But what made his action indefensible was the fact that, after a constitutional crisis, an Act of 1910 decided that in cases of dispute between the two houses the question should be decided by referendum, and further that the electorate by a great majority, on having placed before it by referendum the issue of abolishing the upper chamber, had decided for its retention, as a real part of the State machinery. By swamping the house it was rendered possible to carry legislation so confiscatory in character that the London market was closed to Queensland borrowing, until later concessions were made and part of the wrong undone, and this was followed by the agreement of the house to its abolition. The whole of the advantage of an upper house was thus lost through the unconstitutional neglect of duty by a political partisan.<sup>1</sup>

<sup>1</sup> Parl. Pap. Cmd. 1629 (1922), Keith, *Letters on Imperial Relations, 1916-1935*, pp. 271 ff.

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More serious still is the question of the position of the Governor when he is advised to act in such a manner as to violate the law.<sup>1</sup> If there is doubt, of course, regarding the legality of action, he is entitled to demand a legal opinion, but he may rely on it when given, unless it is so obviously wrong as to render it farcical, and few issues are so clear as to make such an event probable. The case of having to sanction the use of martial law has often arisen, especially in Natal in 1906–8, and repeatedly in the Union, as in 1914 and 1922 in special. It is obviously difficult if not impossible for a Governor to refuse action in such a case. For one thing martial law is not necessarily illegal; it may amount merely to exercise of the common law right of the Crown to suppress rebellion or disorder, and in any case it would involve a grave responsibility to decline to agree to what was represented to be essential in the public safety. But it is instructive that Lord de Villiers, when acting as Governor-General of the Union in 1914, was unwilling to exercise any power beyond what was legal, such as the imposition of a censorship of news or the forbidding of the export of foodstuffs, or even the mobilisation of the local forces, without summoning Parliament to meet in thirty days as required by the Defence Act, 1912.

Financial issues raise like questions, but it is seldom easy for the Governor to refuse assent to irregular expenditure, for he is normally assured of later legislation, just as in the case of martial law he is sure of an Act of Indemnity in due course. It is, however, usual for Governors before granting a dissolution to seek assurances that supply has been granted sufficient to tide over the period until Parliament meets, and

<sup>1</sup> The new Coronation Oath of George VI. is clearly illegal in its departure from the terms of the Act 1 Will. and Mary, c. 6, though the changes are in themselves proper, Keith, *The King, the Constitution, the Empire, and Foreign Affairs, 1936–1937*, pp. 21–31.

the fact that supply cannot be obtained is one reason for hesitating to accept the advice to dissolve. The dangers of action without supply were seen in 1907 when Lord Chelmsford granted a dissolution to Mr. Philp in Queensland and authorised expenditure without sanction of Parliament; the defeat of the ministry was followed by great reluctance to secure supply and threats to move the Crown for the removal of the Governor, and the crisis was avoided only by a change of political alignment which ended in a coalition between Mr. Philp's party and the leader, Mr. Kidston, of the victorious Opposition, as against the more extreme Labour members. Similarly in 1926 Lord Byng's action in allowing expenditure without sanction was resented strongly in Liberal circles, and Parliamentary sanction was accorded with great reluctance.

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Much more serious as a violation of law was the episode of 1924 in Tasmania<sup>1</sup> when the acting Governor, the Chief Justice, actually assented to an Appropriation Bill which had been passed only by the lower house, the upper house insisting on amendments which the lower house would not adopt. The absolute illegality of the course followed was patent, and it is most unfortunate that the acting Governor should have been advised that he could constitutionally assent, if so advised by his Law Officer, and asked to do so by ministers. This precedent was shortly afterwards followed by a like assent by the newly arrived Governor to the Land and Income Taxation Bill, from which the upper house had deleted an important clause. It was recognised at the time in Australia that the action taken might have been successfully challenged in the courts; for various reasons nothing was done, but the widespread disapproval expressed

<sup>1</sup> Keith, *Journ. Comp. Leg.* vi. 205, 206; xi. 127-9, *Letters on Current Imperial and International Problems, 1935-1936*, p. 86.

Chapter VII. renders the precedent of minor importance. The Colonial Secretary, Mr. Amery, however, cannot well be excused for his action, since it was a direct encouragement to the Governor to violate the constitution. It must be added that the incoming Governor failed through some accident to learn of and send to the Colonial Secretary the protest of the Legislative Council, leaving him thus in ignorance of essential information, facts which only later became public.

Fortunately very different views of his duty were held in 1932 by Sir P. Game, Governor of New South Wales. Under the arrangement for the taking-over by the Commonwealth of State debts certain payments were due to the Commonwealth from the State, and the Premier decided to withhold the sums due. Legislation by the Commonwealth followed, which asserted that the Commonwealth Government could secure for itself certain revenues of the State in order to recoup itself for the sums which it had to pay to bond-holders of New South Wales stock. Mr. Lang, after contesting vainly in the courts<sup>1</sup> the validity of the Commonwealth legislation, endeavoured to defeat the levy of taxation for the benefit of the Commonwealth by issuing orders to State officers forbidding them to aid the Commonwealth in the matter of recovery, thus deliberately defying the Commonwealth law after its legality had been asserted by the High Court. Mr. Lang was then asked by the Governor to withdraw his illegal instructions, and on refusal was removed from office, and a new Government appointed which was triumphantly upheld by the electorate. It was clear that in addition to his duty to the law the Governor owed a clear duty to the electorate to give them the decision whether or not they would defy the Commonwealth and refuse to pay their debts to holders of State stocks. No such

<sup>1</sup> *New South Wales v. The Commonwealth* (1932), 46 C.L.R. 155; (No. 3) 246.

proposal had been before the electors at the election of 1930, when a great majority was given to Mr. Lang on the strength of wild promises of prosperity under his régime, and there was overwhelming evidence in the results of the elections in the State for the Commonwealth Parliament, at the dissolution at the close of 1931, that the opinion of the electorate was not in favour of the Government's policy of repudiation. Marked skill was displayed in the handling of the situation by the Governor, who had refused to be induced to act until the issue of illegality became quite clear. Obviously so long as he was not asked to acquiesce in illegal action, it would have been unconstitutional to dismiss his ministry, and any such action might have defeated its own purpose by rallying to the Government the votes of many electors who would object to the Governor's intervention in the affairs of the State<sup>1</sup>

The precedent is of interest in its bearing on the problem presented by the passage by the Dáil Eireann of a Bill to eliminate not merely the oath required by Article 3 of the constitution but also the rule of the constitution that the treaty of 1921 bound the Free State and governed all the terms of the constitution. It was generally assumed that the Governor-General must automatically assent. Clearly, however, this was not so, for the Bill had been criticised severely in the Senate on constitutional grounds, the assent of the British Government to the deletion of the oath being demanded, and the abolition of the supremacy of the treaty being strongly objected to. The Governor-General, therefore, might well have had to withhold assent, especially if he had learned from the King, through his private secretary, that this was deemed proper. But this contingency had been pro-

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 282-9, *Letters on Current Imperial and International Problems, 1935-1936*, pp. 85, 86.

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vided for by the removal from office<sup>1</sup> of Mr. James MacNeill despite the fact that his sole offence was that he remonstrated with his President of the Council because two of his ministers hastily departed when, on his arrival to a function at the French legation, the British National Anthem was duly played. In fact, of course, the pretext was valuable to the ministry because it enabled it to get rid of a Governor-General who might execute faithfully his powers, and to put in his place their own nominee on the understanding that he would return £8000 of the salary provided and cease to exercise any functions save that of attending when summoned to sign Bills.<sup>2</sup>

(4) In the States of Australia and the provinces of Canada the Governors and Lieutenant-Governors are still able to act as agents of the British and the Dominion Governments. Moreover, in the case of New Zealand and Newfoundland<sup>3</sup> the same principle is observed, as neither Government has shown any desire to act on the resolution of the Imperial Conference of 1926. In none of these cases, however, is there much important work to be done, save that the Governments of New Zealand and Newfoundland are thus kept in effective touch with the views on foreign affairs of the British Government. The Australian Governors and the Governor of Newfoundland have also the duty of reserving certain classes of Bills. The Newfoundland list of 1876 illustrates the subjects over which control was long exercised: divorce; the grant of any sum to the Governor; paper currency; differential duties; matters contrary to treaty rights; interference with the discipline of Imperial forces;

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 129-31.

<sup>2</sup> The Constitution (Amendment No. 27) Act, 1936, deprived him of all but bare existence and his extinction was arranged in 1937, a pension being assigned. See sec. (6) below; Keith, *Journ. Comp. Leg.* xix. 108.

<sup>3</sup> The Newfoundland constitution was suspended in 1934.

Bills previously refused assent or disallowed; and Bills of an extraordinary nature and importance affecting the prerogative, or the interests of British subjects not resident in the colony, or British trade and shipping. But the assent might be given if a suspending clause were inserted or in case of urgency where no treaty right or repugnancy to English law was involved. The Australian States have a similar list, omitting differential duties and interference with Imperial forces as not in their power of legislation, and the rule of reservation is subject to the possibility of obtaining prior authority to assent. In the provinces the Governor-General does not now issue instructions to the Lieutenant-Governors; any control exercised over provincial legislation is carried out through the power of disallowance merely. In October 1937, however, assent to three Alberta Bills was withheld pending consideration at Ottawa.

The decision that the Governor-General should be merely the representative of the King and not an agent of the British Government had a very important effect in the case of South Africa. Previously the Governor-General had been High Commissioner for South Africa, in which capacity he controlled absolutely the administration of the colony of Basutoland, and the protectorates of Bechuanaland and Swaziland. But clearly the union of offices in the hands of an officer who was no longer in subordination to the Crown was illogical, and accordingly the connection was terminated in 1930, when the British representative in the Union was given the function of controlling these territories<sup>1</sup> and of exercising the limited authority which is reserved to the Crown in respect of the government of Southern Rhodesia under its constitution. The separation was inevitably a matter of

<sup>1</sup> The High Commissionership for Basutoland, Bechuanaland Protectorate, and Swaziland was provided for by Orders in Council, Dec. 20, 1934.

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some regret to the Union Government and was criticised by Lord Buxton, a former Governor-General. But it was obvious that the interests of the native territories were not necessarily those of the Union, and, although the South Africa Act, 1909, contemplated the transfer of the control of these territories to the Union, clearly that could not well take place without the assent of the natives. Their view is notoriously and probably justifiably hostile, as the Union policy of subordinating native to European welfare, however natural and in South African eyes laudable, cannot be expected to appeal to the natives.

(5) The functions taken from the Governor-General have been transferred to High Commissioners, of whom the first was appointed to Canada in 1928 with duties in part political, to keep the Canadian Government in personal contact with British policy and foreign affairs, in part economic, to control the agencies employed to keep the Board of Trade and British industry informed of Canadian openings. He corresponds, therefore, in some degree to the ministers of foreign powers accredited to the Dominion, but with greater insistence on the commercial side of his work. In all respects he is practically the counterpart of the High Commissioner for the Dominion in London. The appointment has been followed by a like appointment for the Union in 1930, and on the selection of an Australian as Governor-General it was in 1931 decided to create a High Commissionership for the United Kingdom in the Commonwealth and an acting appointment made to that post, which was permanently provided for in 1936. As noted above, the High Commissioner in the Union combines with his own work that of the High Commissionership for Basutoland, the Bechuanaland Protectorate, and Swaziland; though the two offices are not united formally, it is difficult to see how the latter could be

maintained as a distinct post, as there is not sufficient work to do. In the absence of the High Commissioner, the Admiral commanding the African station has on occasion acted for him, as, with rather unfortunate results, in the case of needlessly drastic action in 1933 by Admiral Evans taken against the Bechuanaland chief Tshekedi Khama.<sup>1</sup>

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The value of personal contacts by the High Commissioners with ministers was illustrated on the occasion of the royal abdication, when the High Commissioners were conspicuously in touch with the Governments to which they are accredited. As in the case of Dominion High Commissioners in London, they are not technically representatives of foreign powers, and so cannot claim diplomatic immunity.

(6) The President of Éire is the interesting figure who has emerged from the prolonged meditation of Mr. De Valera on his new constitution. He is, of course, without parallel in the Dominions, and in the present form of the constitution virtually takes the place of the Crown and its representative as regards internal affairs. He is elected by direct popular vote by secret ballot, on the system of proportional representation with the single transferable vote. Any former or retiring President may stand, but only once may he be re-elected, and any person over thirty-five years of age who is nominated by twenty members of Parliament or four County Councils.<sup>2</sup> His term of office is seven years, unless he dies, resigns, becomes permanently incapacitated, or is removed from office. He may not be a member of either house, and, if he is a member when elected, his seat becomes at once vacant. He may not leave Éire during his term of office without the assent of the Government. He may be impeached by not less than two-thirds of the total number of the Senate or Dáil before the Dáil or Senate for treason or other

<sup>1</sup> Cf. *J.P.E.*, 1934, pp. 61, 312, 313.

<sup>2</sup> Art. 12 (2), (4).

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high crimes or misdemeanours, and may be removed from office after investigation by a resolution supported by not less than two-thirds of the total members of the Dáil or Senate.<sup>1</sup> His official residence is in Dublin; his emoluments and allowances, determined by law, are unalterable during his tenure of office. In case of absence, death, resignation, removal from office or temporary or permanent incapacity, established to the satisfaction of the Supreme Court of at least five judges, his powers fall to be exercised by a Commission consisting of the Chief Justice and the Chairmen of the two Chambers. In the case of death, resignation, removal from office, or permanent incapacity, a new election is to be held.

The President is not vested with the general executive power of the State. He is first in precedence, has defined powers, and may be given others by law. He swears to maintain the constitution and takes supreme command of the defence forces, all commissioned officers of which derive their commissions from him. The right of pardon and of commuting sentences is vested in him, but the latter power can also be given to other authorities save in capital cases. These acts he does on the advice of the Government.<sup>2</sup> He appoints also, on the nomination of the Dáil, the Prime Minister, and on his advice the other members of the Government whom he may remove. He summons and dissolves the Dáil on the advice of the Prime Minister, but has absolute discretion to dissolve or not on the advice of a Prime Minister who no longer commands the support of a majority of the Dáil. He may also in his discretion, but after consulting the Council of State, convene without ministerial advice the Senate or the Dáil, and thus controls to this extent ministerial action. He may, after consulting

<sup>1</sup> Art. 12 (10).

<sup>2</sup> Art. 13 (9).

the Council, with the approval of the Government, communicate with the houses of Parliament or address the nation. He is not answerable to either house of Parliament or to any court for his official conduct, save only in so far as it may be investigated on impeachment. Presumably he might be punished criminally if removed from office for treason or other crime.

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Certain really important functions are imposed on him in regard to legislation, his signature<sup>1</sup> being necessary for the validity of any measure. He has for the temporary period of three years, when the new constitution is open to amendment by simple Act, the power, after consulting the Council of State, to require a referendum.<sup>2</sup> He may, after consulting the Council of State but in his discretion, refer to the Supreme Court for an opinion on the validity of any Bill which he is asked to sign in view of the terms of the constitution. If the report is unfavourable, he must refuse to sign.<sup>3</sup> It rests with him, after consultation with the Council of State, to decide whether a request, passed at a meeting of the Senate at which at least thirty members were present for reference to a Committee of Privileges of a money Bill where the validity of the Chairman's certificate is called in question, shall be granted.<sup>4</sup> He decides also, after like consultation, whether to grant the request of the Government for the curtailment of the time allowed to the Senate to consider Bills stated to be urgent; if he grants the request, the measure only remains operative for ninety days unless extended by both houses.<sup>5</sup> A more important power still

<sup>1</sup> Art. 25. he is given 5-7 days to sign. His failure to do this or any other official duty would result in an application to the permanent Commission to act in lieu; Art 14 (4), (5), *Parl. Deb* lxvii. 1299; lxviii 148 ff.; if it failed, the Council of State could provide.

<sup>2</sup> Art. 51

<sup>3</sup> Art. 26.

<sup>4</sup> Art 22.

<sup>5</sup> Art. 24. It does not apply to Bills to alter the constitution.

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exists as to Bills which are carried over the head of the Senate.<sup>1</sup> If within four days a majority of the members of the Senate and not less than one-third of those of the Dáil petition him to decline signature, he may, after consultation with the Council of State, decide that the measure is of such national importance that the will of the people thereon should be obtained,<sup>2</sup> whereupon he can sign the measure only if approved at a referendum or by a resolution of the Dáil, passed within eighteen months of his decision after a dissolution. At such a referendum the measure shall be held to be vetoed only if there is a majority against it, amounting to not less than  $33\frac{1}{3}$  per cent of the registered voters.<sup>3</sup> None of these powers is of negligible importance, and they may, of course, be increased by legislation, but no such law may make his authority exercisable without the assent of the Government.<sup>4</sup> The post, therefore, is of high importance and might come to rival that of the Prime Minister.<sup>5</sup> It is, of course, open to the legislature to confer on the President external prerogatives, but, as we have seen, for these purposes it may be preferred to make use of the Crown. The change, however, could be made now by simple legislation.

<sup>1</sup> Art. 23.

<sup>2</sup> Art. 27.

<sup>3</sup> Art. 47 (2).

<sup>4</sup> This is an amendment of the original draft, Art. 13 (11).

<sup>5</sup> Mr. De Valera has energetically denied this possibility (Dáil, June 14 1937).

## CHAPTER VIII

### THE GOVERNMENTS—MINISTERS, PARTIES, AND CIVIL SERVICE

WHILE the representative of the Crown plays a part now mainly formal in the machinery of government, the burden of control rests on the ministry, which is enabled to support it by the aid of the Civil Service. The existence of the ministry is bound up indissolubly with the party system, through which the people, their representatives in the popular house of Parliament, and the ministry are kept in effective contact.

(1) Dominion practice differs from British usage in the fact that the Cabinet is normally identical with the Executive Council. There are exceptions to this rule, dating from the introduction of responsible government in Tasmania and Victoria, and in the federations and the Union the principle is followed that ex-members of the Cabinet remain, on retirement from office, still in theory members of the Executive Council, but not under summons to it. The importance of the position was revealed in 1926 in Canada, when the refusal of Lord Byng to grant a dissolution to Mr. Mackenzie King led to the resignation of the latter. Mr. Meighen undertook to form a ministry and was duly sworn in, but he did not wish to face the House of Commons, whose hostility he feared, except with the strongest muster possible. His appointment vacated his seat in Parliament under the then rule, and so would the appoint-

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ment of other ministers. But by the law any member of the Privy Council, as the Executive Council in Canada was styled as a tribute to its importance, may be appointed by Order in Council to act as minister for the time being. Hence Mr. Meighen as Prime Minister caused a Privy Council to be summoned, at which former ministers who remained Privy Councillors were called upon to attend, and at this meeting several acting appointments as ministers were made. The action taken was strictly legal, as the Deputy Minister of Justice certified, but the position was wholly unconstitutional, for patently it was a mode of evading the law requiring re-election on appointment as minister, and Mr. Mackenzie King strongly denounced the new ministry on this score. On this as on other grounds the Progressive group, on whose aid Mr. Meighen may have relied when taking office, combined with the Liberals on July 1, 1926, to defeat and censure the ministry, whereupon Parliament was summarily punished by dissolution without the usual attendance of the Governor-General to announce the termination of the session, the assent to many Bills already passed was thus lost.<sup>1</sup>

The existence of the Executive Council normally rests on the prerogative, but it has statutory authority in Canada and its provinces, in the Commonwealth as opposed to the States, and in the Union of South Africa. In the case of the Irish Free State the same condition applied, and the Government which supersedes the Council under the Constitution of Éire is of course purely a statutory creation. Appointments to the Council, except in the Free State or Éire, are made by the Governor-General, Governor, or Lieutenant-Governor, and in law it is still open to make any person a

<sup>1</sup> Dawson, *Const. Issues in Canada*, pp. 77-85. An oath is regularly required of councillors as of judges and ministers; for Canada see 24 & 25 Geo. V. c. 21.

member of the Council, for its numbers are never limited by law. In constitutional practice, of course, appointments are made on the initiative of the Prime Minister of the day. In certain cases ministers must be members of the Council; that applies in the Commonwealth, the Union, New Zealand, South Australia, and Victoria. In practice, of course, ministers are regularly in the Council, which constitutes the Cabinet. There may be included also ministers not in charge of departments, usually called honorary ministers, though arrangements are normally made to provide them with remuneration through sharing salaries with departmental ministers.<sup>1</sup> The practice in this regard varies from place to place and time to time. Thus Mr. Mackenzie King in 1935 reduced his ministry to sixteen members,<sup>2</sup> one honorary, the last being assigned to the Senate in accordance with his disapproval of placing in that body ministers with departmental obligations. Mr. Bennett had twenty-one in his Cabinet, four honorary. The reduction was secured by placing under a Minister of Transport the departments of Railways and Canals and Marine, and under a Minister of Mines and Resources the departments of Immigration and Colonisation, the Interior, Mines, and Indian Affairs. At the same time the duties of the Solicitor-General were handed over to the Attorney-General, who is also Minister of Justice. The Attorney-General is normally in the Cabinet and exercises functions of a Minister of Justice. It is an innovation that in the Constitution of Eire he is excluded from the Government, though he holds office at the pleasure of the Prime Minister and retires with him. The use of honorary ministers is increasingly appreciated in the

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<sup>1</sup> In New Zealand in 1936-7 salaries were pooled and shared with leading members of the Labour party

<sup>2</sup> 10,000 dollars plus 4000 as M.P.s.

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Dominions, where they supply the want of Under-Secretaries. The appointment of such Under-Secretaries has been urged in Canada,<sup>1</sup> especially by Senators who have seen in the suggestion a mode in which work could be found for them to do and the Senate might be made a more effective factor in government, but nothing has been done. In the Union the number of ministers of State, originally ten, is now fixed at eleven,<sup>2</sup> but an honorary minister or ministers may be added, and any member of Council may be appointed, under Act No. 17 of 1933, to act in charge of a department *pro tempore*, though not himself a departmental minister. In the Commonwealth the number of ministers of State was raised from nine to ten<sup>3</sup> by Act No. 35 of 1935. There are in addition assistant ministers who correspond with honorary ministers. Ministers who are not included in the Council, as in the United Kingdom the majority of ministers are not included in the Cabinet, were common under the former régime in Newfoundland, but not elsewhere, except at times the Solicitor-General of Canada

Ministers are only in a few cases compelled by law to be or become members of one or other of the houses of Parliament, the period allowed being three months. This is a sign of the modern constitutions of the Union and of the Commonwealth; it was adopted from the first in South Australia and in less absolute form in Victoria. Western Australia requires that one minister shall be a member of the upper house, which is elective; Victoria will not allow less than two ministers to sit there. The United Country party Government of April 1935 was constituted of eight departmental ministers, six in the lower, two in the upper

<sup>1</sup> Dawson, *op. cit.* pp. 161, 265–7.

<sup>2</sup> £3500 Premier, £2500 others

<sup>3</sup> £13,560 is given for salaries, increased to £15,679 in 1936, £800 is paid as Parliamentary salary in addition.

house, and four ministers without portfolio equally divided between the two houses. The number of members in the upper house depends partly on the representation therein possessed by the party with a majority in the lower house—which, if the Government is Labour, may be very small—partly on its importance and powers In the Union it is normally considered that one Senator suffices, in the Commonwealth two, the strength of the upper house in the States accounts for the deference shown to it in regard to appointments.

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In the constitution of the Irish Free State of 1921 an experiment was projected of the appointment of extern ministers who were not to be included in the Executive Council, not to share joint responsibility, to hold office for the duration of the legislature and until the appointment of their successors, to be responsible to the Dáil, and to be taken from outside the Dáil, as opposed to all members of the Executive Council who must be members of the Dáil—or in one case of the Senate during the existence of that body. The experiment was actually carried into effect for the first two Dáils, but it was found to be unworkable. No department can have a policy divorced from finance, and finance is the essential feature of the responsibility of the Council, so that the distinction became merely awkward, while the extern ministers were regarded as inferior in status to their confrères, but, on the other hand, tended to seek to assert an independence of attitude inconsistent with harmonious working. In 1927, therefore, the restriction of numbers of ministers in the Executive Council to seven was removed, twelve being substituted as the maximum, and it thus became optional to the Dáil to have all ministers in the Council, which was therefore the course followed in practice. The Constitution of Éire (Article 28) places the number of

Chapter VIII. the Government at from seven to fifteen, gives the Dáil power to elect the Prime Minister for appointment by the President, to approve the nominations of the Prime Minister for the other ministries, requires membership of either house—not more than two in the Senate, imposes the rule of responsible government and insists on collective responsibility and the preparation and presentation of the annual estimates.

Apart from law, convention demands urgently the presence of ministers in the lower house if possible, but at least in Parliament. When Mr. Aberhart's Social Credit party was victorious in Alberta, he had forthwith to acquire a seat in the legislature. Occasions do occur when ministers remain in office for a time without seats, as in Prince Edward Island in 1930–31, when the Attorney-General had no seat; but even so useful a minister as Mr. P. J. Glynn in the Commonwealth had to resign when in 1919 he failed to achieve re-election. It is possible in the case of nominee upper houses to appoint a rejected minister to that chamber, and occasionally in the larger lower houses such as Canada, a place can be found for a defeated minister by the resignation of a loyal supporter, as was done when Mr. Mackenzie King was defeated in 1925. But the inability to provide an honour for a zealous friend renders this process far less easy than in the United Kingdom.<sup>1</sup>

The essential feature of the ministry is the Prime Minister, the person invited by the representative of the Crown to form an administration when the office is vacated by death, resignation, or rarely dismissal. In his choice of a successor to a retiring Prime Minister the Governor's discretion is often guided by the advice of the outgoing

<sup>1</sup> Thus in 1935 a seat was found for Mr. M. MacDonald by giving a peerage to a very minor politician.

Premier.<sup>1</sup> This is normally tendered, as by Mr. Baldwin in May 1937, contrary to the older English rule, observed by Mr. Gladstone, that it should be given only if asked for. But of course, whether offered or asked for, it is in no wise binding. On the other hand, the choice is normally limited by the essential facts. It is seldom that more than one leader of the majority party could succeed in forming a Government. The Governor, however, can offer the chance to whomever he thinks fit, and, if he can secure colleagues, can formally appoint him. The Premier's resignation, as in the United Kingdom in 1935 and 1937, dissolves the ministry in the sense that ministers merely hold office until they are either relieved by the appointment of others, or are asked by the new Premier to remain at their posts or to accept other offices. In coming to a decision on this point the Premier has normally no need to take into account the issue of re-election, for the practice of requiring re-election on accepting office when in Parliament has been almost entirely eliminated from the Dominions, where it was abolished in Canada in 1931, leaving it to survive for the moment in Newfoundland and provinces like Saskatchewan, in both of which re-election is not requisite on the first formation of a new ministry after a general election. A strong protest was made by Mr. Mackenzie King against the innovation, and the desire was expressed that it should be restricted to the formation of a ministry within nine months after an election, as under the British Act of 1919. But the complete abolition was successfully defended on the strength of the British Act of 1926. The real objection is the possibility of ministerial office being awarded as the price of political conversion

<sup>1</sup> In 1920 the Duke of Devonshire at Sir R. Borden's request urged Sir Thomas White to become his successor; Dawson, *Const. Issues in Canada, 1900-1931*, pp. 385-8.

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to a man elected as a supporter of the Opposition. The argument which carried the day was the inconvenience of having to deny office to able men because they might risk defeat on standing for re-election.

The Premier has, of course, to secure the Governor's approval of his selection, but that is practically formal, though the Governor has the right to object on personal grounds to any unfit person, and no doubt this power has been used in some cases to prevent unsuitable selections. In the Labour Governments of Australia, however, the selection of ministers is done by the Parliamentary caucus, and this is extended even to the Premier, though the form of selection by the Governor remains. In these cases the Premier's right is reduced to allocation of portfolios, if even so much is conceded. To get rid of a minister who will not conform with the Cabinet views or resign is simple. The Governor could be advised to remove him under his absolute right to dismiss, but normally the more elegant and courteous course is taken of resignation by the Premier, who is then commissioned to form a new Government whence the offender is omitted. This plan was used by General Botha against General Hertzog in 1912, and General Hertzog similarly rid himself of Mr. W. B. Madeley in 1928 when they disagreed as to native policy. Normally, of course, the dissident minister resigns, more or less reluctantly.<sup>1</sup> But in Alberta on May 1, 1937, Mr. Chant was removed by Order in Council.

The degree of Cabinet unity varies. In theory it should be

<sup>1</sup> For the case of Mr. Blair in Canada in 1904, see Skelton, *Sir Wilfrid Laurier*, ii. 203 ff.; for the demand of Mr Tarte's resignation in 1902, see *ibid.* ii. 176-84, where the doctrine of solidarity is emphasised. Mr Hepburn in Ontario and Mr Aberhart in Alberta demanded resignations on this score in 1937. For Sir R. Borden's removal of Sir S. Hughes, Nov. 9, 1916, see Dawson, *Const. Issues in Canada, 1900-1931*, pp. 120 f. For the rule of Eire, Art. 28 (9) (4), giving direct power to the Prime Minister, see *Parl. Deb.* lxvii. 1173-1204.

complete, and Canada has had a long series of strong Premiers whose control has been nearly absolute—Sir John Macdonald, Sir W. Laurier, Sir R. Borden, Mr. W. MacKenzie King, and not least Mr. Bennett, whose Cabinet was in 1930–35 freely derided as wholly subservient. Sir O. Mowat, the great protagonist of provincial rights, dominated Ontario for twenty-four years, and Mr. Ferguson in that province and Mr. L. A. Taschereau in Quebec<sup>1</sup> are recent instances of imperious control, paralleled by Mr. R. Seddon's rule in New Zealand which won him the sobriquet of "King Dick". Generals Botha, Smuts, and Hertzog have been masters in their own house. In Australia, Mr. Hughes dominated his Cabinet until resentment secured in 1923 a coalition of forces against him and deprived him of any following. Mr. Lang in New South Wales and Mr. Theodore in Queensland were clearly far superior in power to their associates. But many Cabinets in the Dominions have been weak and divided, and in Newfoundland, since Sir R. Bond fell from power in 1908, conditions remained utterly unstable and distinctly unsatisfactory, proving how important is the control of an effective ministerial head; the suspension of the constitution in 1934 was the inevitable outcome. In the Free State, Mr. Cosgrave's long rule and the control exercised by Mr. De Valera are undoubted.

In the Free State, as we have seen, the rule of law provided that the President of the Council should be the choice of the Dáil, not of the Governor-General, who up to 1936 merely confirmed the choice, while the President could

<sup>1</sup> His rule ended in disaster in 1936, partly owing to the development of very strong Nationalist feeling, partly through corruption in administration. The election of Nov. 1935 did not give an effective majority; the budget could not be passed in June, he resigned, and Mr. Godbout took office, but in August the necessary election gave the National Union party 75 to 15 seats and Mr. Duplessis took office.

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choose his colleagues but must obtain the approval of the Dáil. On loss of the confidence of the Dáil the ministry must resign, holding office only until their successors were appointed.<sup>1</sup>

(2) The relation of the ministry to the lower house, which is thus clearly emphasised in the Irish constitution, rests elsewhere in convention, a far more convenient course. A ministry must in the beginning have a working control of the lower house, though it happens occasionally that it can carry on with amazingly little foundation. In 1913–14 the Commonwealth Government had a majority of one in the lower house and was in a hopeless minority in the Senate. Where, as often, the Government is a coalition one or rests on the grudging support of a critical though not Opposition section, its position is especially delicate. Mr. Mackenzie King's ministry in 1925–6 was grievously hampered by having to rest on the aid of the Progressives. Mr. De Valera's Government in 1932 was similarly dependent on the votes of its Labour allies, and the first Government of General Hertzog similarly was sustained by a coalition with Labour. It follows that the rigidity of the British rule of regarding any defeat on an issue of importance as fatal is not accepted in the Dominions; Government will not be discredited if it announces that it regards a matter as of consequence, and yet overlooks a defeat.<sup>2</sup> The small size of the legislatures and accidents of attendance necessitate recognition that incidents of this sort are inevitable.

If the control of the house passes from the Government, through internal dissension or coalition of Opposition elements or other grounds, it can choose between resignation

<sup>1</sup> For modifications under the Constitution of Éire, see p. 236, *ante*.

<sup>2</sup> Cf. Mr. Mackenzie King's views, *Commons Debates*, Feb. 12, 1923, against carrying this doctrine too far.

or a dissolution, and normally the latter course is preferred, for the former, as in the case of Mr. Balfour's resignation in 1905, must be regarded as an admission of failure. In 1924 the loss of a bye-election proved the final impetus to General Smuts to put his waning fortunes to a test which proved fatal. Apart from loss of authority, a dissolution may be induced by a change of policy which is deemed to require popular endorsement. On that subject it must be admitted that dissolutions have been generally avoided. The federation of Canada was approved by Canada and Nova Scotia without a dissolution, and in both cases with the approval of the representative of the Crown and of the British Government. It cannot be said as regards Nova Scotia that the precedent is a fortunate one, for the injury thus done to the province has never ceased to cause bitterness. In the case of the Union of South Africa all the colonies save Natal agreed to union without reference to the electorate, but Natal insisted on a referendum. It is noteworthy that, despite this fact, the result of union has been so unsatisfactory as to create a strong secession movement in that province. The same thing must be recorded of Western Australia, which likewise accepted federation by a decisive majority at a referendum.<sup>1</sup> The issue when the people should be allowed a voice has never been settled. A conspicuous course of action without regard to electoral pledges was that of Mr. Lang in New South Wales when he advised repudiation of debt obligations and a generally confiscatory policy, which ran counter to his attitude when he asked for the mandate of the electors. Nor were there lacking bitter complaints by the Labour party of New Zealand against the policy of the ministry in 1931–2 for which it was declared it had received no possible mandate. To extend the life of a

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916–1935*, pp. 172–5, 344, 345.

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legislature without a mandate is clearly a strong step justified, if at all, only by war. To impose conscription was held impossible in Australia, the device of a referendum was resorted to in lieu of an election with the inevitable result of failure in 1915 and 1917 alike. In Canada the necessary measure was passed in anticipation of the election of 1917, thus giving the opportunity of popular disapproval. But it was accompanied by the War Time Elections Act, which enfranchised nearly half a million women and others interested in securing aid for the forces overseas, and this was denounced vigorously by Sir W. Laurier as the creation of a special electorate for an election. The abolition of the Queensland Council in 1921-2 certainly could not be said to have been approved by the electorate. In the case of the attempts to abolish that of New South Wales the claim was made by Mr. Lang that the question had been before the electorate in the general election. This raises the always difficult issue how far the inclusion of one topic among many induces the vote of the electorate, and the fair interpretation of the mandate given, an issue much discussed in the United Kingdom regarding the safeguarding measures of the period 1925-9, the protection legislation of 1931-2, and the rearmament programme of 1936.

The question naturally is often raised of the propriety of referring to the people, otherwise than in the confusion of a general election, issues on which there is widespread divergence of view, and which deeply affect the popular interest. The most important cases in which this step has been taken affect question of control and prohibition of the liquor traffic, an issue which always divides deeply popular opinion. In Canada the question came to a height during the war as a result in part of the contemporaneous prohibition movement in the United States, and for a period popular

referenda resulted in a régime of prohibition throughout the Dominion save in Quebec. After the war the tide flowed in the opposite direction, by referendum after referendum the provinces affirmed their decision to prefer State regulation, the more rigid rule being by 1937 extinguished throughout the country. In Australia, on the other hand, referenda in the States on the issue showed a resolute determination not to deprive the populace of the pleasure of alcohol, whether in moderation or otherwise. New Zealand likewise has had to make prohibition a matter of local option, and, in its wider aspect, of periodic referenda which have so far failed, with increasing decision of late, to effect complete prohibition, though that was nearly achieved under war conditions. The other topic which has been thought specially fitted for such treatment is that of religious education in the schools, and a certain success has attended the effort thus to inculcate officially the principles of Christianity into the children of Queensland. Still less use has been made of the initiative and referendum, as will be seen later. The general tendency of ministers in the Dominions, as in the United Kingdom, is to prefer to keep issues under normal Parliamentary control and to seek authority in the multifarious appeals made at a general election.

The position of ministers on defeat at an election is not more clearly defined than in the United Kingdom. In the Dominions, as in the United Kingdom, the old practice of holding office until ejected by a vote of no confidence has given way normally in favour of resignation. All depends, of course, on what is not always easy to decide, whether the Opposition parties can form an effective Government. If there is doubt it is quite legitimate to wait and see. Thus in 1925 Mr. Mackenzie King, though his party had no majority over the Conservatives and the Progressives, properly

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refused to resign despite his personal defeat, but waited until the opening vote showed a majority for the administration of 125 to 115.<sup>1</sup> Where the result is to defeat the ministry, and it resigns either before or after meeting the legislature, there is no absolute rule binding the representative of the Crown to send for the leader of the largest of two or more Opposition groups. He must be determined in his action by the paramount consideration who is most likely to be able to form an administration by some form of coalition or working agreement which can carry on for a reasonable time the administration of the territory.

(3) The essential basis of the working of responsible government in the Dominions, as in the United Kingdom, is the existence of the party system, which has been adopted on every hand. The party serves to secure agreement on a course of action, the selection of candidates for election, the education of the electorate in the purposes of the party, for which purposes public meetings, distribution of literature, and canvassing are regularly employed, and the persuasion of voters to cast their suffrages at the elections for the candidates selected by the party organisation. Without parties there would clearly be no possibility of effective cohesion or the working of the machinery of legislation or government, and in the national interest there is always pressing need that parties shall not be too many or degenerate into groups. Such a state of affairs deprives the State of directing energy and force. It leads to temporary arrangements between groups for limited purposes, and dissipates the energy which should be exhibited by Government. These considerations are fully realised in theory in

<sup>1</sup> Mr King did not make a vacancy for himself to succeed to before his party was sustained, though Mr. A. Meighen did so in 1921; *Commons Debates*, Jan. 8, 1926, pp. 12-25.

the Dominions; in practice they are subject to difficulties of exercise which are only in part overcome.

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From the United Kingdom the parties of *Canada* borrowed their names, but little else. But it is impossible to exaggerate the importance in the history of the Dominion of the tendency given by English practice to consolidate members of the legislature into effective sections. The vast distances, the racial, religious, and linguistic differences among Canadians, might easily otherwise have resulted in the presence in Parliament of a mass of groups with warring plans. The early days of the united province of Canada, from 1841, were marked by the difficulty of carrying on responsible government with a mass of groups, the advanced reformers of Upper Canada; the still more advanced French Liberals of Lower Canada, the extreme Conservatives of Upper Canada, and the more moderate reformers of Lower Canada, whose true character was Conservative, and who by 1856 had formed effective connections with the Upper Canadian Conservatives, now reconciled to realise that to be French was not to be a rebel or Republican. The creation of the Dominion in 1867, with the addition of the maritime provinces, and later of the west, fortunately did not upset the system of the parties, though it added to their complexity and confused their principles, so that the cynical Sir J. Macdonald could declare—perhaps with remembrance of American conditions—that party is merely a struggle for office. Certainly the lines of party have one merit; they cut across province, race, religion, and economic conditions; though the Roman Catholic Church has at times been definitely a supporter of the Conservatives up to 1896, then of the Liberals, it showed in 1930 that it was sensible of the danger of being supposed to be definitely attached to any party and gave the Conservatives 24 seats in Quebec itself,

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VIII. a result naturally not repeated in 1935. The Church, of course, dominates Quebec, and its long zeal for Conservatism was due primarily to the fact that leading French Liberals were accused with some truth of being Liberals, not merely in politics, but in clerical matters. Clerical influence was therefore freely used against the Liberals, but the excesses of the movement brought retribution in the fact that the Supreme Court of Canada insisted on reversing the views of the Quebec courts that a priest might threaten his flock with excommunication if they voted for Liberals and vacated elections where such intimidation was proved.<sup>1</sup> The Pope himself intervened to moderate such unseemly misuse of spiritual power, and the worst symptoms subsided, affording a curious contrast to the less statesmanlike attitude of the Curia in the case of Malta in 1929–32. But another factor in keeping Quebec Conservative was the great ability of Sir J. Macdonald's ally, Sir George Cartier, a consummate master of electioneering. The advent of Sir Wilfrid Laurier to the leadership of the Liberal party in 1891 proved a turning point in its fortunes, for he was a loyal son of the Church and a French Canadian, and when, despite clerical intervention, his party won in 1896, the way was clear for Quebec turning to Liberalism. The reaction in 1930, though not by any means complete, was largely evoked, it is believed, by the feeling of the hierarchy in Quebec that the cause of French Canadianism was suffering in the rest of Canada from the belief that it was too deeply engaged with the fortunes of one political party, so that influence was exerted both in Quebec and outside to induce Catholic voters to cast their votes for the Conservatives. In 1935 Liberalism resumed its sway.

<sup>1</sup> Sir J. Willison, *Sir Wilfrid Laurier*, chap. xi; Keith, *Letters on Imperial Relations, 1916–1935*, pp. 292 ff.; Parl. Pap. Cmd. 3588, 3993.

On no vital issue are the parties now divided on principle.<sup>1</sup> Autonomy was in essence the aim of Sir J. Macdonald despite his effective appeals when necessary to British sentiment; Sir W. Laurier was probably no more an autonomist than Sir John, and Sir R. Borden was responsible for the most decisive acts of Canadian autonomy, the demand for separate signature of the peace treaties, and for membership of the League, though the Conservative leader won his place largely because British feeling was excited against Laurier in 1911 on the suggestion that his reciprocity agreement with the United States would facilitate merger in the United States. The present Liberal leader is clearly as autonomist as his Conservative antagonist, Mr. Bennett, but the paradox is that French Canada, while absolutely determined on self-government, is extremely nervous about any relaxation of the British North America Acts lest the religion and language which they so much admire should be weakened by exposure to interference by the British majority in Canada as a whole. Again the Liberal party was at first the champion of the provinces against the unifying policy of Sir J. Macdonald, who had hoped to see a united not a federal Canada, but when in power Sir W. Laurier denied full autonomy as regards religious education to Saskatchewan and Alberta, and every movement in these provinces to control this issue has been denounced by Liberals in Quebec. On fiscal policy the Liberals were once devoted to free trade, but in office they found it necessary to favour protection to meet the views of their supporters in the east and to buy off Ontario hostility. There remains, however, a certain distinction on this head; the Liberals have clearly a stronger hope for lower tariffs than their rivals, as they showed in the revision in 1937 of the Ottawa Agreement of

<sup>1</sup> Cf. Dawson, *Const. Issues in Canada, 1900-1931*, pp. 355-428.

Chapter VIII. 1932, for they are more in touch with the western farmers' efforts to release themselves from the shackles of the high prices exacted under protection by the manufacturers of the east. They secured also in 1935 the great boon of a wide measure of reciprocity with the United States.

Party organisation in Canada should logically affect only the federation, and parties in the provinces should be based on different lines. But in fact they prevail throughout the provinces, though in the west they have had to yield in recent years to another movement. The organisation, such as it is, rests on the British model of local branches of central parties, the provinces forming an intermediate unit between constituency and federation. American influence is seen in the practice which has become recently<sup>1</sup> general in federation and province alike of choosing the party leader by Convention, in lieu of election by the party caucus in the legislatures. At these Conventions also the party policy is discussed and in some degree decided. But it must be remembered that British tradition is strong, and that in very large measure policy, whether formally approved or not at Conventions, is really the work of the leaders of the party, though they endeavour to keep themselves in touch with their followers, and to divine as well as may be how far and in what direction they can safely lead them. The introduction of compulsory service during the war is an excellent example of the mode in which a decision is reached by a ministry after long preliminary consideration of the position and its possibilities, and even so the party which had, in order to make it effective, to conclude a coalition with those Liberals who put patriotism first suffered severely

<sup>1</sup> First adopted in Nova Scotia in 1930 by the Liberal party. In federal politics Mr. King was chosen by a Convention in August 1919, Mr. Bennett in Oct. 1927 (*Dawson, op. cit.* pp. 392 ff.).

among the farmers for its attitude. Needless to say, in the provinces local issues provide little possibility as a rule of effective grouping on a permanent basis, a fact which has told in favour of the maintenance of the traditional federal party grouping as the dominant factor in party struggles.

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While the parties are founded on a territorial basis and are open to all voters, and the policies arrived at at the annual Conventions or otherwise are based on general considerations, the war produced the phenomenon of a party movement based on sectional interests. The United Farmers of Ontario, resting on the support of Farmers' Clubs, from 1919 to 1923 governed Ontario, but in the result, through corrupt administration, failed to retain power. The United Farmers of Alberta, however, won power in 1921 and retained it until defeated by the Social Credit party under Mr. Aberhart in 1935,<sup>1</sup> the movement was successful in 1923 in Manitoba, and a like movement has produced a strong influence in Saskatchewan. The kindred federal party, the Progressives, were at the election of 1921 the second strongest party, but their policy was soon divided by doubts as to whether to continue, as the Farmers of Alberta were doing, as a purely sectional party, or to extend their ranks by an appeal to general interests. Moreover, in June and July 1934<sup>2</sup> the party lost ten members, who explained that they objected to political parties of the ordinary type, with majority rule in caucus, whip domination, responsibility for leaders' statements and action, and so forth. This meant the evils of competition, of domination from the top; instead they felt their duty to be that of co-operating in Parliament

<sup>1</sup> This party has been active in semi-repudiation, in part illegal, of debts, e.g. Debt Reduction Act, 1937. Its experiment in prosperity certificates broke down in April 1937.

<sup>2</sup> Dawson, *Const. Issues in Canada, 1900-1931*, pp. 231-5.

Chapter VIII. with all parties and groups so as to secure the best possible legislation for Canada as a whole. Mr. Forke, the Progressive leader, gave in vain the unanswerable reply: "Unity of purpose and of action and a definite Parliamentary organisation are essential to any effective action in the House of Commons and to the attainment of the practical reforms which our constituents look to us to pursue". It is not surprising that since 1926 the party has been ineffective. In the constitutional crisis of June-July 1926<sup>1</sup> its attitude disappointed Mr. Mackenzie King and Mr. Meighen alike, for it seemed unable to make up its mind which minister to stand by, but finally determined to defeat Mr. Meighen on the score that he had violated the constitution in trying to govern with a Cabinet of acting ministers.

The Labour party has never played a conspicuous part in Canadian politics, though it has formally existed since 1921. It is hampered by the fact of the strong individualism which has so long marked Canada—as it did the United States; opportunity for rapid promotion from the ranks of Labour has tended to deprive it of able leadership, nor had it, like the Farmers' party, the advantage of being able to appeal to a large number of immigrant agriculturists without special reason to attach themselves to either of the historical parties. But new forces were set in motion by the economic *débâcle* which became marked from 1929, and unexpectedly led to the defeat of the Liberals in 1930, mainly it seems because they were blamed for economic difficulties which they did not create and against which the limitation of federal authority made it hard for them to fight. The Conservative Government developed a definite policy of very high protection, and thus increased the difficulties of the western farmers. It is not surprising if in these circumstances

<sup>1</sup> Dawson, *op. cit.* pp. 85-8.

heterodox views gained power, and Dr. Douglas' social credit theories took root. In Alberta, as already mentioned, the movement swept the province, giving control to Mr. Aberhart, who was at the time not even a member of the legislature. In the federal sphere the result of the election of 1935 gave a Social Credit party of 17 members. Its success doubtless explains the comparative failure of the rival organisation, the Co-operative Commonwealth Federation, which was designed to embrace Labour, and the Farmers' movement, so far as that survived,<sup>1</sup> and which seemed to be likely to secure adherents in the prairie provinces. It secured only 8 seats. Even greater disaster awaited the Reconstruction party, formed by Mr. Stevens as a protest against the flagrant disregard by the Conservative party of the interests of the workers and consumers, for he alone survived the election. The victory was essentially that of Liberalism, with 169 seats against Conservatism with 41.

But Liberalism, successful in the federation, received in 1936 a severe blow in Quebec. The ministry there had fallen into discredit, largely through accusations of corruption, and there had emerged a party of revolting Liberals, the Action Liberale Nationale, in which the nationalism of Quebec was rather strongly marked. The election of November 25, 1935, did not give a clear majority for the Government, the new party having 26 seats and the Conservatives 16 against a nominal 47 Liberals disunited. Refusal to grant supply resulted in the resignation in June of Mr. Taschereau, and the defeat on August 17, 1936, of the Liberals after forty years of power by the National Union, a coalition of the Conservatives and the Action Liberale Nationale, whose electoral propaganda was in some cases marked by a very

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<sup>1</sup> The United Farmers had 10 members in the former house.

Chapter VIII. definite racial tinge, not, however, homologated by the leader, Mr. Duplessis, who secured 75 out of 90 seats.

Even more serious, however, for Liberalism was the open breach between Mr. Mackenzie King and the Premier of Ontario which took place on June 3, 1937, when Mr. Hepburn repudiated<sup>1</sup> the federal leader. The prime cause of offence seems to have been the attitude of the federal Government towards the activities in Canada of the American Committee for Industrial Organisation under Mr. Lewis. Serious strikes had taken place in Ontario, and friction had arisen between the Premier of Ontario and the federal Government<sup>2</sup> over the provision of assistance in maintaining order, the federal Government being patently anxious not to seem to take any part in the dispute against the workers. Mr. Hepburn, however, acted energetically, removed doubting members of his Cabinet, and insisted that the rule of law must prevail in Ontario. He contended that the recovery of prosperity was dependent on the export trade, and that on reasonable costs of production which were threatened by the vacillation of Ottawa in confronting efforts to introduce American methods of labour pressure, and by the paternalism in vogue. He further appealed to Mr. Duplessis to stand out as a great national leader, while Mr. Duplessis' representative, at the gathering at which Mr. Hepburn's declaration was made, was at pains to stress that there was no implication of secession in the nationalism of Quebec, and that they were extremists only because they wanted the best for the country. It is, therefore, clear that the future of Liberalism, no less than that of Conservatism,

<sup>1</sup> At Toronto, Canadian Life Assurance Officers' Association banquet.

<sup>2</sup> Mr. Hepburn ended by asking for the withdrawal of mounted police drafted into Toronto (April 15, 1937) and enlisting 200 war veterans as special constables. On October 6 he won the election by 63 seats out of 90, and received Mr. King's congratulations.

is uncertain. It is to be noted that the contemporaneous election in British Columbia, while giving a large plurality of seats to the Liberals, probably did not give them a majority of votes, and that the Conservatives, excluded from the previous legislature reappeared 8 strong. The patent fact is that Canada is far too large for any simple division of parties being carried into the provincial sphere. British Columbia, Saskatchewan, and the Maritimes still tend to be Liberal, Manitoba enjoys its régime of control by farmers of Liberal outlook. Communism, despite American affiliations, has never shown much sign of healthy life as a political force, and it has been the object of repressive legislation, especially in 1937 in Quebec, where a building used for such propaganda may be closed for a year.

In Newfoundland, as we have seen, there never existed any real divergences of principles on which to found parties, and politics degenerated into a scramble for office and power to help one's constituents while furthering primarily one's own interests. The electors, it is said in the report of the Royal Commission, 1933, "argued that, if a man proved himself capable of using his political opportunities to his personal advantage, he would be the better equipped to promote the advantage of his constituents: an honest man would only preach to them". Religious feeling, once a potent source of difficulty, occasionally had weight, and federation projects with Canada were capable of evoking strong feeling, while acute difference arose as to the merits of such a policy as the sale of the Government railway and the mortgaging of the assets of the colony in 1898. But it was only occasionally that a personality like that of Sir R. Bond could make itself a unifying influence, and after 1908 the state of politics became chaotic, and the scramble for power led to grave irregularities, and to charges and counter-

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charges of corruption not indeed proved but equally not dissipated. The suspension of the constitution was clearly inevitable.

In *Australia* the traditional two-party system was taken over from British practice, but naturally without the essential basis of discrimination there existing, though land questions and free trade served at times to render parties more real. The advent to importance from 1890 of a strong Labour movement introduced a real cause of party divergence, and a new style of effective political organisation. The Labour movement came to be based on a definite organisation of trade councils and similar bodies, presenting features differentiating it from the older parties which have since copied in some degree its methods. Discipline is rigid; matters are decided in Parliament by the vote of the party caucus, and no member may disobey on pain of expulsion; sometimes members must sign an undated resignation which the executive of the party can hand in if the member is recalcitrant. The fundamental lines of policy are laid down at the meetings of the central federal and State representative organisations and their findings bind all members, who must promise before acceptance as candidates to obey the federal or State platform, and to vote as the Parliamentary caucus demands; no candidate may stand except as a Labour supporter, or accept aid from any other party or give such aid to candidates of any other party. The federal organisation is closely connected with the State organisations, so that in a real sense, except in case of dissentient movements—such as that of Mr. Lang in New South Wales whose movement spends its time in partial reconciliation<sup>1</sup> and partial dissent from the main Labour movement—the Labour movement in Australia is unified in a way quite

<sup>1</sup> In March-April 1937 another effort at conciliation came to grief.

unknown to the other parties in which State and federal bodies remain distinct.<sup>1</sup>

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Organisation of this type might be expected to destroy all individuality, and it does in large measure destroy the value of debate, for after caucus has decided no arguments can move members whose loyalty is assured by the fact that politics forms their means of livelihood and disobedience will probably entail the loss of a seat and of a living. But the actual effect of the control varies with place, time, and the personality of those affected, and the leading spirits of the Labour party often, though by no means always, prove superior to the bonds of convention. Further, it must be remembered that it is they who on the whole succeed in dictating the policy which at its conferences or conventions the party homologates. The result, of course, is that there are many bitter conflicts within Labour ranks, for those who are in Parliament are unwilling to obey the dictates of those who from outside seek to direct their course of action. But naturally there are strong objections felt in the opposing parties to the spectacle of Labour members casting their votes without regard to the merits of the arguments, or even according to their own convictions, but as dictated by men most of whom are outside politics. To feel that national policy is really decided by men who exempt themselves from the moderating influences of political life is a reasonable source of annoyance. Unquestionably this factor explains some part of the extremism which marks political Labour in Australia.

The effect of the appearance of Labour in strength has been to consolidate the forces opposing into a sort of coalition, the United Australia party, united unfortunately by little more than dislike of Labour. This movement of uni-

<sup>1</sup> See *Trends in Australian Politics* (ed. W. G. Duncan, 1935).

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fication is, however, far from effective. It is crossed by the evolution of the Country party as an important factor both in the Commonwealth and the States. Its emergence and existence are due to realisation of the fact that neither Labour, which relies on the support of the workers in the towns, nor the orthodox anti-Labour party has any real interest in the primary producers in the country, for the latter represents the views of capital in the towns. The net result of this intervention of a sectional party is on the whole to the advantage of Labour through the splitting of anti-Labour votes. But the sad confusion of Australian finance under Labour auspices in 1930-32 has resulted in more effective coalition of the forces opposed to it, as shown in the return of anti-Labour Governments in the Commonwealth, New South Wales, and Victoria,<sup>1</sup> and the coalition of the same forces in South Australia. On the other hand, Queensland has reverted to Labour control, though with a small majority in 1932<sup>2</sup> in comparison to the pluralities which for many years marked the Labour domination there. Labour holds its ground in Western Australia (1936) and Tasmania (1937).

*New Zealand* was long faithful to the Liberal party, whose victory in 1891 gave them office to 1912. It then yielded place, on the minor issue of freehold against leasehold tenure, to the Reform party, while from 1915 to 1919 a National Government was formed. The Reform party then resumed control until defeated in 1928; since then Mr. Forbes found it necessary to effect a coalition which as against Labour aimed at rehabilitation of the national

<sup>1</sup> In April 1935 the United Country party, having quarrelled with the United Australia party, took office with Labour support, and repeated its success in October 1937. At the same time the federal coalition substantially maintained its position in the House of Representatives but lost heavily in the Senate.

<sup>2</sup> In 1935, however, Labour won 47 to 15 seats.

finance and retrenchment. Labour has grown in strength; it is essentially a sectional party, whose left wing is of very advanced opinions; on November 27, 1935, it won a decisive victory gaining 52 seats out of 80.

In the *Union of South Africa* the division of parties was based unquestionably in the main on the different attitude adopted towards the Anglo-Boer war. Generals Botha and Smuts headed the predominantly Dutch South African party which aimed at achieving unity of feeling and equality between British and Dutch; the British Unionist party and the Dutch Nationalist party stood for racial interests primarily. The death of Botha in 1919 weakened the South African party, and its continued tenure of power was rendered possible only by the merger in it in 1920 of the Unionist party as against the hostility of the Nationalists and Labour, and an election of 1921 gave a substantial majority. But it was weakened because the Nationalists could now assert that General Smuts had gone over to the side of the British element, and the Labour party could reproach him with subservience to capitalism, and the decline of the fortunes of the ministry led in 1924 to a general election and the return of a Nationalist-Labour coalition to power. The final cause for hostility on the part of Labour had been given by the stern repression of unrest on the Rand in 1922, and coalition was made possible by the agreement of General Hertzog not to take up the issue of secession. Moreover, the path of the new Prime Minister was made more easy by the visit of the Prince of Wales in 1925, which conciliated Dutch feeling to some degree, and his success in securing the declaration of Dominion equality at the Imperial Conference of 1926. The election of 1929 gave him a clear majority, relegating Labour, which had split into sections, into mere dependence. Racialism was strongly

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marked under his régime, and insistence on the knowledge of Afrikaans and other means were effectively used to diminish the number of British in the Civil Service, while large sums were spent on giving work at relatively high rates of pay to unskilled Europeans at the expense of the natives, who were to be kept out of as much skilled work as possible. Later on, the economic crisis in Europe led to the Government finding itself in serious difficulties as a result of the decision, dictated by grounds of dislike of following British example and perhaps hostility to the mining industry, to remain on the gold standard. This resulted in serious losses to the farmers, and a clear sign of revolt which would have meant the loss of the general election. But a coalition was secured through discussion with General Smuts, partly as the result of efforts of Mr. Tielman Roos to take advantage of the position to re-enter politics, which under stress of ill-health, since fatal, he had left to take up a judgeship. The two leaders decided in March 1933 to co-operate against a dangerous rival, no doubt largely because the mining interests, who control the leading organs of the British press in the Union, felt that it would be far more to their advantage effectively to secure generous terms from General Hertzog than to defeat him, in the certainty that he would later return to power as an embittered enemy.<sup>1</sup> Coalition led without much delay to fusion of the parties into the United South African National party. It was agreed that the issues of the divisibility of the Crown, secession, and neutrality should be left as they were, neither leader making any concession, but that within the United party any person who pleased might profess the doctrine of republicanism and

<sup>1</sup> On General Smuts' enigmatic character there are studies by S. G. Miln and H. C. Armstrong, expediency has dominated his actions at the cost of principles, which his philosophic creed forbids him to hold strongly. Hence his failure to command the respect of followers, as did General Botha.

work towards that end. It was not unnaturally felt by some members of the followers of General Smuts that he had stultified his previous, it must be admitted, unrestrained denunciations of the incompetence and unsound views of General Hertzog, and that in particular he had betrayed the natives whose cause he used to champion, and that they could not follow a policy which seemed fatal to the maintenance of the existing relations with Britain. A small Dominion party was then formed which has only a weak following so far, but which is ably led. A different trend of view is found in Natal, where some politicians have advocated secession in view of the anti-British outlook of the governmental party. But secession is impossible, and a sort of compromise with this movement resulted in the abandonment by General Hertzog of his own desire to unify the country and abolish the province as such. The session of 1934, therefore, included legislation morally if not legally reassuring the provinces as to their maintenance as part of the system of government by providing that extinction or diminution of power should be dependent on their own petitions.

The Nationalist elements of the country are, naturally, by no means pleased with the coalition or fusion, which seems to them unfavourable to their doctrine of republicanism and the exclusion of British interest from the Union. They have formed a party under Dr. D. F. Malan of the Cape, where indignation at coalition ran high, and the recent provincial elections in the Transvaal in 1936 were rather encouraging to the movement. It has, of course, behind it all the forces of republicanism, which are very strong, and it has a powerful appeal to racial supremacy, which is steadily in process of being established. It is, therefore, probable that this party will in due course emerge as the dominant force in politics, for many within the United party are still

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essentially Nationalist in outlook, and regard the coalition as a mere necessary mode of escape from a special difficulty which has disappeared with the prosperity induced by the departure from the gold standard. That change has given the ministry the great encouragement which every Government derives from abounding revenue. The Labour forces in the Union are not yet strong, but the character of Labour has altered with the increasing number of Dutch who have joined its ranks, and it is no longer racially an essentially British immigrant party. It has difficulties of many kinds to face, especially in the matter of the proper attitude to adopt to the semi-skilled natives, who demand a fair chance to obtain work on reasonable terms but whose competition is feared greatly.

In the *Irish Free State* party lines were determined from the outset by the deplorable issue over the acceptance or rejection of the treaty, and the civil war thereafter arising, which was marked by much greater brutality on the part of the Government than was to be expected towards men formerly their close associates. The execution in 1923 of Erskine Childers was eloquent of the hatred and jealousy of the ministry for a man of disinterested character and genuine enthusiasm for liberty and justice, but who had the misfortune to be English and a Protestant. The victory of the Government, thanks to its measures of barbarism, left deep bitterness in the Opposition, which at first refused to enter Parliament on the score that they could not conscientiously take the oath demanded by the constitution. When in 1926 they were virtually compelled to do so on pain of seeing all seats occupied by supporters of the Government, they had at first to struggle against a superior strength of the ministry supported by independents and representatives of the farming interest. Their turn, however, came in 1932, when in

coalition with Labour they controlled the situation, and Mr. De Valera formed a ministry. A dissolution in 1933<sup>1</sup> Chapter VIII strengthened his position by giving him an absolute majority of one, for Labour could not withdraw its support without losing the industrial legislation it desired. The ministry was soon involved in a bitter struggle with Britain, already referred to, over the question of the abolition of the oath and refusal to pay land annuities, which led to a tariff war, still subsisting, though much modified in character and effect by arrangements in 1935-7 for exchange of coal and cattle, which have prevented the complete ruin of the Irish export cattle trade. The ministry, by a policy of encouraging the establishment of many small local industries under the protection of tariffs, and of the creation of small agricultural holdings in place of large pastoral holdings, has endeavoured to lessen the dependence of the State on the British market and thus to loosen economic and financial as well as political, intellectual, and linguistic bonds.

The Irish Republican Army remains in the background. The accusation that it dominates Mr. De Valera is plainly untrue, for he has used effectively against it the extremely drastic machinery of the Constitution Amendment (No. 17) Act, 1931, which was a most unwise legacy from Mr. Cosgrave. But that it is extinguished cannot be suggested. The opposition of Mr. Cosgrave has been ineffective, partly because of its complete lack of principle and opportunism, good relations with Britain being demanded at the same time as efforts were made to embarrass Britain by forcing Mr. De Valera to refuse to carry out sanctions against Italy and to recognise General Franco. The party seems clearly

<sup>1</sup> The election of 1937, contemporaneous with the vote on the Constitution, gave an equality of numbers, but Mr. De Valera was re-elected President by 82 to 52 votes (July 21).

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to have lost respect and influence from this duplicity of outlook and its confused relations with the politically incompetent General O'Duffy, who for a brief period was to head a movement uniting all opposition elements. Mr. F. MacDermot as an independent critic of the ministry<sup>1</sup> has shaped well, but has no following, and the outlook for the United Ireland party can hardly be deemed bright, as Fianna Fail is united by republican fervour and devotion to an admittedly able leader, whose rigidity and doctrinaire character are in harmony with those of his followers.

The relation between the ministry and party organisations in matter of policy, as has been noted, differs considerably from place to place. On the whole the position which prevails is very much as in the United Kingdom. Efforts to bind ministries by the resolutions of conventions or conferences are, in the main, not successful, except, of course, to the extent to which these bodies are used by ministers as the means of formulating their own policies. Where this is not the case, ministries in every Dominion have ways and means of disregarding what the convention or conference has been pleased to dictate. Even the strength of the Nationalist party organisations in the Union did not deter General Hertzog from coalition and later fusion with General Smuts, though in the Cape the local organisation of the Nationalists was captured by the Opposition and used to form the basis of a rival Nationalist party.

The relation of a leader to a party convention has formed the subject of formal investigation on several occasions in Canada,<sup>2</sup> and in the Commons on March 13, 1922, Mr.

<sup>1</sup> He stands almost alone in a sincere acceptance of the Crown, as shown in the debates on the Constitution of Éire (lxvi. 953-66); see also his just rebuke of Mr. Cosgrave's false accusation of Mr. De Valera's "slavish subservience" to Britain as regards Abyssinia and Spain (*ibid.* 692).

<sup>2</sup> Dawson, *op. cit.* pp. 397 ff.

Mackenzie King made very clear his attitude on the issue; the platform adopted by the convention of 1919 he regarded as the chart on which was plotted the course desired by the people of the country as expressed through the voice of Liberals, and in 1923, when assailed on his alleged failure to implement the promises of the platform regarding the tariff, he pointed out that what had been done in Parliament was in exact accord with his pre-election speeches of 1921, when he defined his attitude towards the platform and gave assurances that it would not be interpreted to deprive established industries of legitimate protection. The Conservative platform at Winnipeg, 1927, was not greeted with much enthusiasm by the leading organs in the press, but it was made noteworthy by reason of a violent altercation between the former Prime Minister, Mr Meighen, and Mr. Ferguson, which dealt with the right of the leader of the party to declare vital political policies without reference to the party as a whole. Mr. Meighen, speaking at Hamilton, Ontario, on November 16, 1925, in the hope of winning a bye-election, pledged the party to the view that, before any forces were ever again sent from Canada to take part in a war, not only must Parliament approve, but there must be a general election to decide the issue. This was much resented by many Conservatives; Mr. Cahan on December 9, 1925, deprecated such pronouncements without due consultation and consideration; and the convention of 1927 clearly shared that opinion. Of its own results, the *Montreal Gazette* said: "If Mr. Bennett is permitted to take the best of the platform and to leave the rest, it will be better for the Conservative party and very much better for the country". Neither Mr. Bennett nor Mr. Mackenzie King has in fact shown undue deference to such general gatherings.

Party involves expenditure, and few parties can flourish

Chapter VIII. without contributions from wealthy men and firms, who must be repaid in the form of contracts and privileges, honours if possible, and senatorships in Canada. A striking example of the system is seen in the statement that the Beauharnois Power Corporation and its officers gave 700,000 dollars to the Liberal party before an election in order to secure favours to come in the matter of the development of power from the St. Lawrence. Mr. Mackenzie King insisted that he never knew the source of party contributions,<sup>1</sup> and asked for an investigation into the sources of party funds in general, which was not conceded. In striking contrast is the fact that the Progressives during their brief activity raised funds by local subscriptions of small amount —the method now vainly advocated by Liberals and Conservatives in the United Kingdom, though often practised by Labour. In the case of Newfoundland scandals on this head are innumerable, and explain the *débâcle* of 1933.<sup>2</sup> More refined is the regular practice under which Parliaments confer benefits on localities at the public expense to meet the claims of loyal constituencies. In Australia, New Zealand, and the Union also funds must be raised in similar ways; the plan of protection throughout the Dominions means that there are always industries which can afford to expend large sums in providing the parties which favour them with the necessary sinews of war. The Labour parties, on the other hand, have to rely on small contributions enforced from individual members and funds provided by trade unions and like bodies.<sup>3</sup> But they enjoy the enormous advantage of almost unlimited unpaid service at elections. The

<sup>1</sup> So Lord Oxford and Asquith; Spender, ii. 359 See for many scandals Dawson, *op. cit.* pp. 194-218.

<sup>2</sup> Keith, *Journ. Comp. Leg.* xvi. 28.

<sup>3</sup> New Zealand by the Political Disabilities Removal Act, 1936, facilitates use of funds even by associations of Civil servants for political ends.

chief advantage enjoyed by their opponents is the power of the press, a fact which explains, though it does not justify, the illegal effort<sup>1</sup> of Mr. Lang to place an excise on newspapers carefully calculated to secure that the Opposition newspapers would be shunned on the score of cost by all workers.<sup>2</sup>

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Party serves the purpose of keeping members amenable to the instructions of the Government. In no place is the man who changes his politics after election approved, and even alterations of outlook in a national crisis, such as the moves made in 1915–16 by Mr. Hughes, evoke an amazing and enduring bitterness of spirit, comparable with the indignation felt in 1931, when the more moderate section of Labour in the Commonwealth broke away from Mr. Scullin's feeble guidance and formed a new party with the Opposition, on the score that it was essential to save Australia from bankruptcy and repudiation of liabilities.

(4) While ministers in the Dominions do far more detailed work than is requisite in the United Kingdom, it remains essential that the chief work of the State should fall on the Civil Service. The history of that Service has followed that of the British Civil Service, though at a considerable interval of time. The principle of official independence of political influence and loyal obedience to changing ministries is now far more widely recognised than in the past. The struggle has been prolonged especially in Canada under American influence, but even there much progress has been made.<sup>3</sup>

<sup>1</sup> *John Fairfax & Sons v New South Wales* (1927), 39 C.L.R. 139.

<sup>2</sup> Party issues are outside the sphere of legal enforcement as a rule, e.g. a member of the South Australian Labour party, unfairly treated by the executive, has no redress: *Cameron v. Hogan* (1934), 51 C.L.R. 358. Cf. *Lang v. Willis* (1934), 52 C.L.R. 637, on rules of selection of candidates by the local electoral council or the central body.

<sup>3</sup> R. M. Dawson, *The Civil Service of Canada* (1929), *Const. Issues in Canada, 1900–1931*, pp. 285–319.

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Under the system prevailing before 1908 patronage was political, officers were far too numerous, inefficiency predominated, good work was discouraged through political promotions. In 1908 the Service at Ottawa and in 1919 the Service outside were brought under the control of an independent body of Civil Service Commissioners, and in 1923 a pensions scheme was started. The Commission is independent of political control, the members being removable only by addresses from both houses; they have wide powers of examination, and promotions are in theory in their hands, though a voice is given to the deputy head of the department. The system is not perfect; there is a tendency to restrict too much entrance to those who join in the lower grades, thus excluding the profitable employment of university candidates; promotion examinations reimposed in 1919 seem unwise; the promotion system, if it avoids political pressure, works with dubious satisfaction and seems to obscure responsibility, but the improvement on the old régime is enormous. The problem of the employment of women has proved as incapable of satisfactory solution as elsewhere, while railway employees are placed under the control of the Railway Commissioners and not under ordinary Civil Service rules. One strong objection to leaving such employees under Civil Service conditions is the insolubility of removal for inefficiency in the case of Civil servants. While the power to remove exists amply, it is seldom taken advantage of save in cases of flagrant misconduct, and in fact the Canadian Civil servant now enjoys much of the permanency which is the lot of the British Civil servant despite the theoretic tenure at the pleasure of the Crown, which remains embodied in the law of the Dominion.

The question of political activity on the part of Civil servants has vexed Canada greatly; under the old régime

dismissals on this score after each general election were wholesale and discreditable. Under the new régime the principle is laid down emphatically that any Civil servant may record his vote, but must not "engage in partisan work in connection with any such election or contribute, receive, or in any way deal with any money for any party funds". The penalty for violation of this rule is dismissal at the pleasure of the Governor in Council.<sup>1</sup> Of the necessity and utility of the rule there can be no doubt, nor would Canadian conditions permit any such relaxation as is sometimes suggested in the United Kingdom in the case of minor officers, such as country postmasters, lighthouse-keepers, etc.

The example of the Dominion has gradually been followed by the provinces; thus Saskatchewan placed its servants in 1930 under an independent commission; so Nova Scotia in 1935 (c. 8). In Newfoundland, however, partisanship was rife, and political influence predominated. Under the new régime reorganisation is being effected with great increase of efficiency and honesty.

In the *Commonwealth*, on the other hand, from the first measures were taken to safeguard the efficiency and purity of the Service. The Service is controlled by an independent Commission, which deals with most issues affecting it, including promotions, and the servants are given securities against removal for any but substantial reasons and a legal right to claim pay due.<sup>2</sup> The same general features are accepted in the States, where the English rule of tenure at pleasure has been largely modified by statute. It is still retained in the *Commonwealth* for defence forces, and has been held applicable to police forces. There is, of course,

<sup>1</sup> Many cases took place in 1930 and 1936.

<sup>2</sup> Salaries are usually regulated on principles analogous to arbitration awards; for Western Australia see Act No. 31 of 1935, which gives a special jurisdiction to the Industrial Arbitration Court.

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no absolute possibility of removing all political influence, special posts may be created, the Commissions may be influenced by a minister, temporary appointments may be made outside normal rules, and special powers vested in the Governor-General in Council or Governor in Council are sometimes abused. But in the main the Civil Service is adequately safeguarded. The chief defect lies in the failure to offer careers to University graduates,<sup>1</sup> in the comparatively poor salaries, and the rather unsatisfactory conditions for superannuation. Special arrangements are applied normally on the State railways, as employees in such cases are obviously not properly subjected to rules, which after all protect inefficiency rather than promote competence.

Political activities on the part of Civil servants are regulated very ineffectively in Australia. Labour ministries in effect desire that employees should work in their interests, and have not hesitated to declare their approval of such action. It is significant that in 1903, after a railway strike of much severity, Victoria attempted to segregate railwaymen and Civil servants into special constituencies, but abandoned the effort in 1906. As there is adult suffrage, such action is practically useless, for the relatives of those affected could be trusted to vote as they desired. In 1935, by Act No. 4334, the right was conceded both to railwaymen and Civil servants to stand for election without prior resignation of seats; a similar Bill had failed in 1923 and 1926.

*New Zealand* also accepts the principle of a Commissioner to control appointments and promotions, but excludes, as usual, the railwaymen, police, and defence from his jurisdiction, making special arrangements for railwaymen, and providing superannuation funds. Political action has become of

<sup>1</sup> In the Commonwealth, Act No. 38 of 1933 permits a limited number of such appointments.

late a most serious issue, and in the Finance Act, 1932, it was necessary to provide, in regard to the Civil Service, the teachers, and railway employees that, if the appointing authority was satisfied with respect to such a person that he had been guilty of conduct calculated to incite, procure, or encourage grave acts of injustice, violence, lawlessness, or disorder, or that by public statements or statements intended for publication in New Zealand or elsewhere, he had sought to bring the Government of New Zealand into disrepute, or that in any other manner his conduct had been gravely inimical to the peace, order, or good government of New Zealand, it should be lawful for the appointing authority, with the concurrence of the Governor-General in Council, to terminate his employment without notice. The clause was vehemently attacked in Parliament, but the circumstances seem to have rendered necessary a distinct warning to employees of their obvious duty of loyalty to the Government which they serve. In 1936<sup>1</sup> the Labour Government repealed these provisions, and even authorised officials to stand for Parliament and the use of the funds of associations of officials for political ends.

In the *Union*, as required by the constitution, the public service is controlled by a Commission of three members, who, however, only hold office for five years. They have wide powers in respect of appointment, promotion, grievances, grading, etc.<sup>2</sup> They are, however, subject to the control of the Governor-General in Council, and in the period since 1924 the policy of the Government has been to insist on bilingualism in all officers and on the preference of Dutch to British. It is significant that so many dubious appoint-

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<sup>1</sup> See *J.P.E.*, 1936, pp. 163-8; Political Disabilities Removal Act, 1936.

<sup>2</sup> Act No. 27 of 1923. There is a Public Service Advisory Council on which 8 representatives of associations sit with 4 Civil servants.

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ments have been made of late years that the Speaker has ruled that questions in Parliament suggesting improper action are not to be allowed, a rather frank confession of the truth of the feeling expressed in 1930 by the Bishop of Johannesburg that Englishmen are not wanted in the public service. Employees of the railways, ports, and harbours fall under the control of the Railway Administration,<sup>1</sup> at the head of which is the minister, aided by a Board of three Commissioners, while the executive power rests with a General Manager. The policy of this régime has been to secure wide employment for Dutch landless subjects, despite the fact that the work done by them costs much more than like work performed by natives. Needless to say, the political advantages to the ministry of this factor have not been ignored, nor have they passed without criticism, as the Act of 1909 requires administration on business principles, which plainly are not being observed.

The *Irish Free State* appoints a Board of Civil Service Commissioners, but it holds office at the pleasure of the Executive Council, and, while it normally decides on appointments, the head of any ministry with the assent of the ministry of finance may except posts from its control. It can therefore be held that evasion of exclusion of political influence is possible, but the standard of selection appears to have been high, nor does political activity on the part of the Civil Service appear to have been objectionable.

Most of the rules which affect the position of Civil servants in the United Kingdom<sup>2</sup> have their parallels in the Dominions. Civil servants are not liable in respect of governmental contracts. They are, on the other hand, liable to suit or to criminal proceedings in the case of tortious or criminal

<sup>1</sup> South Africa Act, 1909, ss 127-31; Act No. 17 of 1916.

<sup>2</sup> Anson, *The Crown* (ed. Keith), i. 239 ff.

conduct committed by them in official work. A superior officer is not normally responsible for the torts of his subordinate,<sup>1</sup> for he is not his employer, and responsibility will attach to him only if he actually orders the wrong that is done or fails to give proper instructions to prevent its happening.

Officials again enjoy certain privileges, for example in respect of alleged libels contained in official reports which are certainly privileged.<sup>2</sup> But the courts are not anxious to extend unduly this branch of the law. For instance the High Court in *Gibbons v. Duffell*,<sup>3</sup> declined to accept the argument that the report of a superior officer of police on a subordinate is not only privileged, which it accepted, but enjoys absolute privilege so as to exclude evidence of malice to destroy the privilege. The court distinguished the unsatisfactory majority decision in *Dawkins v. Lord Paulet*,<sup>4</sup> as dealing with military officers, but also indicated anything but affection for that really unsatisfactory ruling, which is still open to overruling by the House of Lords. In a cognate matter, that of the privilege of official records, the Privy Council has restricted excessive claims. In *Robinson v. State of South Australia*,<sup>5</sup> it insisted that, where privilege was claimed for a document on the score that its disclosure would be of injury to the public, it is within the right of the court to examine the document for itself and to judge if the claim is justified, even if an unambiguous assurance as to specified documents were given by a minister as in *Queensland Pine Co. Ltd. v. Commonwealth of Australia*,<sup>6</sup> and it negatived the divergent view taken in *Griffin v. State of South Australia*,<sup>7</sup> by the High Court.

<sup>1</sup> *Carolan v. Minister for Defence*, [1927] I.R. 62.

<sup>2</sup> *Isaacs and Sons v. Cook*, [1925] 2 K.B. 391.

<sup>3</sup> (1932), 47 C.L.R. 520.

<sup>4</sup> (1869) L.R. 5 Q.B. 94. cf. *Fraser v. Balfour* (1918), 87 L.J.K.B. at p. 1118.

<sup>5</sup> [1931] A.C. 704.      <sup>6</sup> 1920 St. R. Qd. 121.      <sup>7</sup> (1924), 35 C.L.R. 200.

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On one matter there is difference between the British and Dominion usage. In the United Kingdom the rule that every public servant may be held to hold office at pleasure, although in fact tenure is carefully safeguarded in practice, admits only a very few exceptions of tenure during life or good behaviour. The same rule applies overseas,<sup>1</sup> nor can it be evaded by any attempt to sue a superior officer as having guaranteed tenure on another basis. But there are many cases in the Dominions where statute steps in to regulate tenure, and in that event the prerogative right to dismiss at pleasure is naturally limited by the statutory restrictions.<sup>2</sup>

Pensions, as in the United Kingdom,<sup>3</sup> are normally not a matter in which the courts can intervene, the executive authority being entrusted with their determination. But of course exceptions may be made, thus in the Irish Free State it was ruled that the persons, who under the treaty of 1921 became entitled on loss of office to pensions, could if they desired enforce their rights by action.<sup>4</sup> In the case of the Commonwealth again the rights of officials taken over from the States were provided for by statute, and they have formed the subject of many decisions by the courts,<sup>5</sup> which have established the fact that the Commonwealth cannot in any way infringe the terms provided in the constitution and that

<sup>1</sup> *Dunn v. Macdonald*, [1897] 1 Q.B. 555, following on *Dunn v. R.*, [1896] 1 Q.B. 116. Cf. *Shenton v. Stuart*, [1895] A.C. 229. See for Ireland, *Kenny v. Cosgrave*, [1926] I.R. 517.

<sup>2</sup> *Gould v. Stuart*, [1896] A.C. 575. So in the railway service *Grady v. Commr. of Railways* (1935), 53 C.L.R. 229. Cf. *Williams v. Commonwealth* (1907), 5 C.L.R. 174.

<sup>3</sup> Cf. as to pay, etc. *Kynaston v. A.-G.* (1933), 49 T.L.R. 300; pensions, *Nixon v. A.-G.*, [1931] A.C. 184; *Anson, op. cit. n.* 336; *De Lacy Smyth's Case*, [1934] I.R. 139; *O'Crowley v. Minister for Justice*, [1935] I.R. 536.

<sup>4</sup> *Wigg v. A.-G. for Irish Free State*, [1927] A.C. 674, *Transferred Civil Servants (Ireland) Compensation, In re*, [1929] A.C. 242.

<sup>5</sup> *Hunkin v. Siebert* (1934), 51 C.L.R. 538; *Flint v. The Commonwealth* (1932), 47 C.L.R. 274.

these terms will be interpreted favourably to the Civil servants concerned.

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Parliament, of course, may at any time intervene to destroy rights given to holders of office, who in that case have no redress by petition of right or otherwise.<sup>1</sup> In this connection the Privy Council has touched on, without deciding the question, whether the relation of the Crown to its officers can be regarded as in any measure contractual. The point is not, perhaps, of much importance, for if there is any contract it patently is *sui generis*.

(5) The intimate relations of the Dominions with the United Kingdom attach special importance to Dominion representation in London. In 1879 an effort was made by Canada to establish representation on a basis comparable to diplomatic status; the British Government compromised on the style of High Commissioner, but both Sir Alexander Galt and Sir Charles Tupper in that office were anxious to develop the political side of their activities as well as care of commercial business. All the Dominions have since then established High Commissionerships, and have employed the holders to perform political functions. Their importance in this regard has been enhanced by the decision taken after the Imperial Conference of 1926 to eliminate the Governor-General as a channel of communication in the case of Canada, the Commonwealth, the Union, and the Irish Free State. While communications pass direct from minister to minister, it is easy also to use the High Commissioner as a link. The importance of the office has been recognised by the grant of precedence in 1931 immediately after Secretaries of State (save when Dominion ministers are present),

<sup>1</sup> *Reilly v. R*, [1934] A.C. 176. On the relations between minister and permanent head, see Mr. McCarron's case, I.F.S., 1937; *Parl. Deb.*, lxv. 54-142.

Chapter VIII. while the Finance Act, 1925, relieves High Commissioners and Agents-General and their staffs of liability to income tax, and by administrative action High Commissioners are accorded the same exemption from taxation in general as is accorded to Ambassadors of foreign powers.<sup>1</sup>

A slightly different proposal was made by Mr. Harcourt in 1912, the stationing in London of a Dominion minister, member of the Dominion Cabinet, who would act as a means of keeping the British and Dominion Governments in the closest touch on all aspects of foreign and Imperial policy. To some extent effect was given to this idea in the position in 1914 of Mr. Perley as representative of the Canadian Cabinet in London. But the proposal has never been generally adopted. In 1932, however, it was decided by the Commonwealth Government not to fill up the vacancy in the office of High Commissioner but to station Mr. Bruce as a liaison minister in London; this position, however, was not maintained, Mr. Bruce becoming High Commissioner. Canada, however, in 1930 contented herself with appointing Mr. Ferguson, formerly Premier of Ontario and one of the chief architects of the Conservative triumph in the election of 1930, to the High Commissionership. As the post had been given to Mr. Massey by the Liberal Government, strong exception was taken by Mr. Mackenzie King to the new step, and he claimed that the office of High Commissioner should be kept out of politics. Mr. Bennett, however, insisted that the post was quite different from the offices of minister to foreign States, which should be regarded as non-political. The Government required at London a person in the closest touch politically with its views. It may be added that doubtless the removal of Mr. Ferguson from Ottawa

<sup>1</sup> High Commissioners are still denied ambassadorial exemption from suit: *Isaacs and Sons v. Cook*, [1925] 2 K.B. 391.

was a considerable convenience to the administration, which regarded with complacency the efforts of the Opposition to censure his excursions into the political field.<sup>1</sup> Naturally, on the Conservative defeat in 1935, Mr. Massey was given the office. The appointment recalls in some degree the position occupied by Sir C. Tupper, who from time to time was formally High Commissioner and so far a Civil servant, and at other times was a minister in the Dominion Cabinet though present in London. There are no doubt advantages in the mode of action chosen by Canada and Australia, for the danger of unwise assurances being given by the minister in London may now be deemed to be a thing of the past.

The States of Australia are represented by Agents-General, who combine in their limited sphere both political and economic functions; but naturally under the present conditions the Agents-General are mainly concerned with commercial and financial questions. The same remark applies to the Agents-General of the Canadian provinces, but they are not accredited to the Dominions Secretary, and he maintains in accordance with the Canadian constitution relations only with the High Commissioner. The position of these Agents-General, therefore, is somewhat difficult, and in 1936 the new Government of Quebec repealed the Agents-General Act, 1925, which provided for Agents-General in London and Belgium, on the score that the London Office cost fifty thousand dollars a year and was not worth it. Other provinces have acted likewise from time to time, but British Columbia still maintains such an Agent.

<sup>1</sup> *Canadian Annual Review*, 1930-31, pp. 81, 326, 327.

## CHAPTER IX

### THE LEGISLATURES—COMPOSITION AND RELATIONS OF THE HOUSES—MEMBERS AND THE ELECTORATES

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— THE bicameral system prevails in the Dominions. In the Canadian provinces it never existed in Ontario, British Columbia, or Saskatchewan and Alberta. It has been abolished successively in Manitoba, in New Brunswick, in Prince Edward Island, which in 1893 compromised the issue by creating a single chamber, one half of whose members are elected on a property franchise, and, after a legal struggle resulting in a declaration<sup>1</sup> of the power to abolish as involved in the right of constitutional change given by Section 92 of the British North America Act, 1867, in Nova Scotia. It remains, therefore, only in the Conservative atmosphere of Quebec, where as in Canada itself politicians of long service like in old age to retire to the upper house. In the Australian States, as has been mentioned, the Legislative Council of Queensland was swept away in 1922 by methods of dubious constitutionality, and a barrier to its revival was created by the Constitution Act Amendment Act, 1933, under which a referendum is requisite. The Senate of the Irish Free State was abolished in 1936, but, though the President obviously was not anxious for its revival, public opinion on the whole favoured a second chamber, and in deference to it, the Senate reappears in the Constitution of Éire.

<sup>1</sup> *A.-G. for Nova Scotia v. Nova Scotia Legislative Council*, [1928] A.C. 107.

The upper houses in the Canadian federation and the Commonwealth have the style, borrowed from the United States, of Senate, and this is also adopted by the Union as one of the reminiscences of federalism in its really unitary constitution. It was employed in the Irish Free State. Legislative Council is used in New Zealand, the Australian States, and Quebec and under the constitution, now in suspense, of Newfoundland. The lower houses are normally styled Legislative Assemblies, but South Australia, Tasmania, Newfoundland, and the Union have the more attractive name of House of Assembly. The Commonwealth and New Zealand prefer House of Representatives, the Irish Free State Chamber of Deputies, regularly in the Irish form Dáil Eireann, and only in the premier Dominion do we find the magnificent title House of Commons. In New Zealand the term General Assembly includes the Governor-General, the Legislative Council, and the House of Representatives, as constituting the legislative machinery as a whole.

(1) The conditions for the franchise for the lower houses now have regularly been assimilated to manhood and womanhood suffrage; in *Canada* in Quebec alone, for the provincial elections, the monstrous regiment of women has been withstood,<sup>1</sup> and due respect has been paid to Bluntschli's magnificent dogma that politics is a thing for men. The inconsistency that Quebec women are ardent politicians and vote for the more important federal elections has no trouble for keen French intellects. The vote is naturally restricted to British subjects (in the Union to Union nationals, in the Irish Free State to Irish citizens), both natural born and naturalised, but in the latter case sometimes subject to naturalisation for a certain period. There is normally necessary a period of residence in the territory, and

<sup>1</sup> By 43 votes to 24 (27 May, 1936).

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IX. a shorter period of residence in the electoral district. The usual disqualifications are minority—the age of majority in all cases is twenty-one—unsoundness of mind, and conviction of crime or electoral misdemeanours, unless a free pardon has been granted or the sentence has been served. But there are many variations of detail, though there is a steady tendency to greater simplicity. Canada adds detention in poor law institutions.

In Canada the federation and the provinces control their own franchises, but the federation in the Franchise Act, 1934 (c. 51), yields respect to the provinces so far as normally to exclude from its franchise those persons who are forbidden to vote for provincial elections, though this courtesy, which seems strained, is not extended to the case of the exclusion of women from the vote in Quebec. The difference of treatment, of course, is due to the fact that women in Canada are powerful and politically to be feared, while in the other cases there is no interest to plead for justice. The federation excludes Eskimos and Indians, living on reserves but not otherwise, who did not serve in the war. The exclusions in the provinces include North American Indians in New Brunswick, British Columbia, Saskatchewan, and Alberta; Chinese in Saskatchewan; and British Indians, Chinese, Japanese, and Doukhobors in British Columbia. It has been definitely decided by the Privy Council<sup>1</sup> that such exclusions, though purely racial and in principle indefensible, especially as the numbers of those affected is small, are quite legal, nor can this be denied, unless it were to be held that the federation as entrusted with naturalisation of aliens had sole power to define their political rights; and of course this would not help the British Indians, whose claim is deserving of far greater considera-

<sup>1</sup> *Cunningham v. Tomey Homma*, [1903] A.C. 151.

tion than it has received in British Columbia. Quebec and, for half the legislature, Prince Edward Island recognise the desirability of a small property qualification.

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The number of members is determined in the federation by the principle that the lower house should give representation by population. Quebec, therefore, is given 65 members, and the numbers for the other provinces are adjusted to correspond therewith according to the results of the decennial census. The present result<sup>1</sup> is that Ontario has 82 members, Quebec 65, Nova Scotia 12, New Brunswick 10, Prince Edward Island 4, the number being preserved solely under the British North America Act, 1915, which saves any province from having fewer members of the Commons than of the Senate, Manitoba 17, British Columbia 16, Saskatchewan 21, Alberta 17, and the Yukon Territory 1. The rule prevails of single-member constituencies, and the older practice of quite unabashed gerrymandering has given place in the main to a fair redistribution based on the recommendations of a Committee representing both political parties. In the provinces numbers are not subject to scientific variation, but are fixed at discretion for varying reasons from time to time. Ontario by a Redistribution Act of 1933 reduced the number from 112 to 90, of whom at the general election of 1934, 75 were returned as Liberals; Quebec has the like number. Nova Scotia, on the other hand, has reduced the number from 48 to 30,<sup>2</sup> and has simplified the franchise law by assimilating it to the federal legislation of 1929 and adopting the Dominion lists of voters if revised

<sup>1</sup> 1933, c. 54; see Dawson, *Const. Issues in Canada, 1900-1931*, pp. 175-87; rural areas have a preference

<sup>2</sup> Four 2-member constituencies New Brunswick has one 1-member constituency, seven 2-member, three 3-member, six 4-member, British Columbia three 2-member, one 3-member, and one 4-member constituencies; three cities in Saskatchewan have 2 members.

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within a year of the election. New Brunswick retains 48 members and has constituencies with more than one member. British Columbia has usually 48, but for the 1933 election reduced the number to 47. Saskatchewan has now 55 members, while Alberta maintains 63, elected for 53 districts. Manitoba has 55 members, and Prince Edward Island 30, of whom half are elected on a property franchise.

*Newfoundland* enjoyed womanhood suffrage at age twenty-five, and there were 40 members, three in two-member constituencies, the rest in single-member constituencies, but in 1932 a redistribution reduced the number to 27. The legislature is now in abeyance.

The *Commonwealth* has adult suffrage, excluding only aboriginal natives of Australia, Asia, Africa, or the Pacific islands, but not Maoris nor, since 1925, British Indians, and if any of the excluded persons is entitled under State law to vote at State elections, he has the federal franchise. The number of members is now 74 for the States, based on a periodical assignment according to population under the constitution; New South Wales has now 28 members, Victoria 20, Queensland 10, South Australia 6, Western Australia and Tasmania 5 apiece. One member without vote<sup>1</sup> represents the Northern Territory. The States adopt single-member constituencies as a rule. New South Wales under an Act of 1928 has 90 such constituencies, redistributed to give the country areas 42 seats, future delimitations to be carried out by a Commission. Victoria has 65, Queensland 62, Western Australia 50.<sup>2</sup> Tasmania has 30 in groups of five, and South Australia, which long had 46, eight constituencies returning 3 members and eleven 2 apiece, re-

<sup>1</sup> See also Act No. 65 of 1936, which allows voting on a motion to disallow an ordinance for the territory.

<sup>2</sup> For redistribution see Act No. 25 of 1928; for Queensland, No. 11 of 1931, for Victoria, No. 3451 (1926).

duced the number in 1937 to 39 in single-member constituencies. Queensland and Western Australia disqualify aboriginal natives of Australia, Asia, Africa, and the Pacific, but Queensland has exempted from this British Indians, followed in 1934 (No. 40) by Western Australia.

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New Zealand has adult suffrage for white persons and half-castes, with 76 single-member constituencies. Maoris have four seats of their own, thus securing full regard for their rights. Periodic redistribution is based on population with a wide preference for rural areas.

The *Union of South Africa* has now simplified its franchise for white persons by according in 1931<sup>1</sup> the vote to all adult males and females, without property qualifications of any kind. This step was deliberately intended to strengthen the Government of General Hertzog by enfranchising women, especially Dutch women, and the poor Dutch whites. No change is made in the native and coloured franchise of the Cape, which is not extended to women. The vote can only be obtained by ability to write name, address, and occupation, and by twelve months' occupation of property worth £75 in the registration district or three months' residence and earnings of £50 a year.<sup>2</sup> By the new system the old equality went for ever, and a strong criticism was made against the change, based on the fact that it contradicted the repeated declarations of General Hertzog's policy. That policy, it was asserted, had definitely promised to place coloured and white on one plane, with votes, and to exclude natives from the vote, in the ordinary way, substituting a limited representation by elected white persons, chosen by native constituencies, a system to be applied also in Natal and the northern provinces where the natives have

<sup>1</sup> Act No. 41 of 1931, No. 18 of 1930 gave the vote to adult European women if Union nationals.

<sup>2</sup> For details see *Official Year Book*, chap. ii. § 9.

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IX. no vote, while in Natal the number<sup>1</sup> qualified is nominal. The Government, so long as General Smuts was in opposition, could not secure further legislation, but the coalition or fusion provided the necessary means for destroying the fatal equality of Europeans and natives involved in the fact that they voted together for the same representatives. It was held that this position was inevitably degrading to the Europeans, who might come into contact with the natives at the polling booths on equal terms, and the measure finally secured in 1936 terminates the régime which had prevailed in the Cape from 1853 and had been the essential condition on which representative government had been conceded to that territory.

The Representation of the Natives Act, No. 12 of 1936, provides for the native voters under Cape law the right to elect in three electoral circles and two divisions respectively three members to the Union Assembly, who must be Europeans and who are additional to the 150 members already existing, and two members, also restricted to be Europeans, to the Cape Provincial Council. Four senators are also to be elected at first to represent the natives in the rest of the Union: 1 for Natal; 1 for the Transvaal and the Orange Free State; 1 for the Transkei, and 1 for the rest of the Cape natives, excluding those who have the franchise. There will be 6 senators later. The voters are to vote in electoral colleges; in Natal there will be chiefs not under local boards; local councils; native advisory boards; and electoral committees appointed by the Minister of Native Affairs; in the Transvaal and Orange Free State similar bodies with management boards of native reserves; in the Transkei the Territorial General Council without the magistrates; in the rest of the Cape chiefs; headmen of

<sup>1</sup> In 1935 1 Bantu only, 10 Asiatics, 343 mixed.

locations not under a local council or chief; native advisory boards; and electoral committees, whose purpose it is to provide for natives who do not fall under other authorities. The period of office of persons thus elected will be five years, and will not be subject to interruption by dissolution. It must be added that a Natives Representative Council is also provided for of 22 members, of whom 12 are elected, 3 by the Transkei, 2 by each of the other electoral colleges, omitting the advisory boards, and 1 by each advisory board. The duties, however, of this body are advisory only; it can discuss and even suggest Bills,<sup>1</sup> it can consider the estimates of the Native Trust Fund, but the amount of work given it to do and its initiative depend entirely on the ministry, so that its worth is problematic. The definition of native is made more restrictive than in the past, though a faint possibility of being given rank as a non-native is afforded to coloured persons under conditions which will certainly exclude from the benefit any person who is not essentially European in outlook and manner of life. Otherwise, the Act indicates clearly enough that there is little intention of making good what seemed at one time to be the possibility, that a more generous treatment of the coloured population was intended. Apparently any idea of action on these lines suggested by General Herzog's proposals in 1926 has been dropped in view of the desirability to make head against the Nationalist party, which is determined to oust the United party from power. The bringing forward with wide support of a proposal to forbid all marriages between Europeans and non-Europeans in 1937 marked the progress of this ideal. The immediate effect of the measure of 1936 was seen in 1937 when the Native Laws Amendment Act was passed, without any consultation of

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<sup>1</sup> Established under the Native Trust and Land Act, 1936 (No. 18).

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IX. the Natives Representative Council, though the most explicit assurances had been given by General Smuts that changes in native legislation would always be submitted to that body for representations before enactment, and Sir J. Rose-Innes among others protested at the breach of faith. No such Act could in all probability have been passed while the native vote in the Cape was in its original state.

The number of seats is determined according to population from time to time. As a result of the last census the figures are 153: 61 for the Cape, 57 for the Transvaal, 16 each for the Orange Free State and Natal, with the three extra representatives of the natives provided for in the Act of 1936. The restriction of the franchise to Union nationals by the Acts of 1930 and 1931 was followed in 1934 by the logical consequence<sup>1</sup> of the restriction of membership of the two houses to such nationals.

The *Irish Free State* constitution was based on the principle of assigning not less than one member for 20,000 voters, who must be citizens, the restriction being the first breach with the normal tradition of accepting British nationality as enough, or more than one for 30,000. The Dáil had originally 153 members, but Mr. De Valera's Government secured reduction by Act of 1935 to 138, University representation being abolished. The constituencies under the new rule return from three to seven members.<sup>2</sup> The Constitution of Éire follows the same principle as to numbers, requires a minimum of three members per constituency, and redistribution at intervals not exceeding twelve years in lieu of the ten under the Irish Free State constitution.

<sup>1</sup> Status of the Union Act, 1934, s. 6.

<sup>2</sup> The Dáil of 1937 was thus elected. It becomes the Dáil of Éire under the constitution when effective, and it can fix the date of its taking effect, but not later than Dec 29, 1937.

*Membership* is normally permitted to any qualified elector, but it is usual to disqualify persons holding contracts from the Government save as members of limited companies, and in certain other cases; and all kinds of civil servants as opposed to ministers. The list of disabilities varies from territory to territory. Conviction for crime is usually a bar, and seats are vacated through conviction of serious crime, or of corrupt practices, bankruptcy, absence without leave in certain cases, and loss of nationality. Naturalised persons are in some cases required to have a special residential qualification for two years at least. The Union requires that members of Parliament, even those who represent the natives, shall be European Union nationals, thus terminating the former possibility up to 1909 of coloured persons or natives being elected in the Cape, and the Act of 1936 applies the same rule to members of the provincial council, thus extinguishing the right of natives or coloured persons, if voters, to be elected even under the South Africa Act, 1909 (s. 70) to the council of the Cape. Five years' residence is an additional requirement to ensure that there shall be identification with the Union. Judges and members on full pay of the defence forces of permanent character are disqualified, and in the Irish Free State members of the police. Resignation is permitted, without requiring any futile form as still in the United Kingdom, at least if the member's conduct is not under investigation by Parliament. In Canada the Dominion and the provinces forbid membership of the Dominion legislature and a provincial legislature at the same time, and like legislation has been enacted for the Commonwealth and the States.

*Payment of members* has long prevailed, the scale gradually being increased, usually without giving the electors a choice, a precedent which Mr. Baldwin in 1937

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IX. unfortunately followed for the United Kingdom, though for men to vote themselves additional emoluments is open to grave moral censure. The highest figure reached, £1000, has been reduced in financial stress, so that in the Commonwealth £850 with free railway transport at present suffices with 4000 dollars in Canada, £700 in the Union, and smaller sums in the other territories. Payment of the leader of the Opposition is normal, and in 1937 was followed in the United Kingdom by Mr. Baldwin, despite the many objections to the weakening of the independence of the leader thus resulting. In the Dominions payment of members has created an additional incentive to close obedience to the Government, which by threatening a dissolution may place a member's livelihood in jeopardy. It has also created the professional politician who lives on his salary, and who cannot afford to have any views opposed to those of the party.

The *duration* of the lower house is five years in Canada, federation and provinces, including Prince Edward Island (1932); it was only four in Newfoundland under the suspended constitution. The Australian rule of three has been broken in favour of five first by South Australia, and in 1936 in Tasmania. The New Zealand Parliament in 1932 extended its life to four years and in 1934 made the change permanent, despite Labour protests, but the period was not altered in the Labour Parliament of 1936. The Union of South Africa has five years, and so the Irish Free State; the constitution allows a maximum of six, increased by the Constitution of Eire to seven.

*Electoral procedure* follows the British model. Writs are issued for a general election by the Governor; otherwise by him or the Speaker. Nomination, polling, and counting of votes are carried out as in the United Kingdom. Registration

of voters is largely compulsory.<sup>1</sup> In the great majority of cases the simple rule of awarding the seat to the candidate with the largest number of votes prevails. It works most unfairly everywhere from the numerical point of view, giving exaggerated majorities of members to parties, and occasionally allowing a party with a minority of votes to secure the control of the house. But in Canada, where the evils of the position are not denied, and where in Quebec they are often seen at their worst, sentiment still prefers the old-fashioned manner of voting. It on the whole is held to have given workable houses, and no doubt this feeling has been helped by the normal absence of more than two great parties. Yet the disproportion in the size of constituencies in the interests of the country areas is carried too far, and it is hardly satisfactory that, as in 1896, a minority of 11,000 votes as compared with the Conservatives yet saw the Liberals with thirty more seats, or that in 1926 the Liberals in Manitoba with 38,000 votes as against 83,000 captured seven seats to none. Nevertheless it is argued successfully against proposals to adopt proportional representation that it would be impossible to expand the western constituencies to the necessary extent to suit the system without making them utterly unwieldy, and it is feared that the new system would bring into existence groups, which would render the task of administration even more difficult than it necessarily must be in a federation. Mr. Mackenzie King has championed the alternative vote, but in vain.<sup>2</sup> Manitoba has, however, proportional representation for Winnipeg as a ten-member constituency, and Alberta has the system for

<sup>1</sup> Voting also in the Commonwealth, since 1924, New South Wales (1930), Victoria (1926), Queensland (1915), Tasmania (1928), but not in the Irish Free State (*Parl. Deb.* lxvi. 1334–41).

<sup>2</sup> In 1936 a Parliamentary Committee disapproved proportional representation. See P. R. Society's Pamphlet No. 81.

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two six-member constituencies, with the preferential transferable vote for the rest. Newfoundland naturally was old-fashioned.

In Australia preferential voting in single-member constituencies has been adopted by the Commonwealth, by New South Wales, which has given up proportional representation, Victoria, Queensland, and Western Australia. The system of the Commonwealth and the States, except Queensland, is to compel the voter to mark his preferences; if no person has an absolute majority, the candidate lowest in the list is discarded, and his second preferences distributed and so on until one candidate has the absolute majority. It is not a satisfactory system, and Tasmania since 1909 has been faithful to proportional representation proper with six five-member constituencies. The system works out with admirable mathematical accuracy and is popular. If it makes weak Governments, that is inevitable, because the State is more or less equally divided in political views between supporters and critics of labour views. New Zealand has tried and dropped (1908–13) the second ballot, but cannot be persuaded to try even the preferential vote. The Union contemplated the possibility of proportional representation, which was urged by the delegates of the Transvaal, but finally dropped it, save for elections of senators and of members of the Executive Committees of the Provincial Councils. As the distribution of seats is distinctly unsatisfactory and makes for much inequality in favour of the Dutch districts, the result was unjust to the South African party, until the fusion in 1933–4. The Irish Free State, on the other hand, adheres to proportional representation, which has served it in good stead. It was by reason of it in all probability that the treaty was accepted in 1922, and since then no party has obtained an exagger-

ated majority, giving the independents and the representatives of labour and farming the opportunity of checking the action of the Government of the day.

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*Limitation of electoral expenditure* has been attempted in several cases, and the need for it is doubtless often strong. In the Commonwealth a candidate is limited to £250 for a Senate election and £100 for a House of Representatives election. Moreover, every association or other body which spends money to influence elections must return that expenditure, and newspapers must reveal what payments have been made for publicity. In Canada a seat costs from 2000 to 4000 dollars to the candidate, and the Conservatives are said to have spent 100,000 dollars to secure the defeat of Mr. Mackenzie King in one election.<sup>1</sup>

*Corrupt practices* are penalised much as in the United Kingdom, and the courts now normally are entrusted with the decision of electoral petitions, from which the Privy Council,<sup>2</sup> and in Australia the High Court of the Commonwealth,<sup>3</sup> accept no appeals. But it remains possible for Governments to bribe the electorate especially at bye-elections by promises of public works to be performed, and Canada in special affords much ocular demonstration of such works undertaken with no higher object than to win the favour of the electors at the cost of the public purse. In Newfoundland the employment of funds on roads was one regular mode of securing local favour.

(2) The constitutions of the upper houses are, as regards the federations and the Union, vitally affected by considerations of federal character; those of the other houses are

<sup>1</sup> Dawson, *Const. Issues in Canada, 1900-1931*, pp. 200, 211; on electoral corruption, pp. 194-218

<sup>2</sup> *Theberge v. Laudry* (1876), 2 App. Cas. 102. Only in 1934 did Victoria adopt a Court of Disputed Returns (Act No. 4278).

<sup>3</sup> *Holmes v. Angwin* (1906), 4 C.L.R. 297.

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IX. essentially the outcome of the early distrust for extreme democracy, which marked the framing of colonial constitutions. Hence they have been the mark of attack, to which the upper chambers of the Canadian provinces have succumbed save in the case of Quebec, and even in Australia Queensland is now unicameral. The other houses have resisted onslaughts, either by reason of their elective character, or by a certain readiness to yield to the lower houses.

In Canada the Senate, under an Imperial Act of 1915,<sup>1</sup> consists of 96 members. The federal principle applies in so far as the provinces are grouped into four groups—Ontario; Quebec; the maritime provinces; and the western provinces—each with 24 senators. Nova Scotia and New Brunswick have 10 apiece, Prince Edward Island 4, and the great provinces of the west must be content with 6 apiece. Obviously this is far from an ideal division, and is explained only by historical grounds. Selection is by nomination of the Dominion Government and appointment by the Governor-General in the royal name. A senator must be thirty years of age, male or female,<sup>2</sup> own property worth 4000 dollars above all debts, hold land worth the same amount, and be resident in the province. Seats are vacated on loss of property or cessation of residence, as well as in the usual cases of bankruptcy, crime, absence, or resignation. The powers of the Senate are not defined by law, save in so far as it is laid down that any appropriation Bill or taxing Bill must originate in the lower house. Nor is there any provision for deadlocks, save the right of the Crown, which would be exercised now on Canadian advice without hesitation, to add either four or eight members in equal proportions from

<sup>1</sup> 5 & 6 Geo. V., c. 45; 30 & 31 Vict. c. 3, ss. 21-36.

<sup>2</sup> *Edwards v. A.-G. for Canada*, [1930] A.C. 124. Women are eligible for all the other upper houses. As a matter of law the decision is hard to defend: its motive is explicable.

the four divisions of Canada in order to overcome a deadlock, a provision never yet employed.

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The Senate<sup>1</sup> obviously from the outset was not based on true federal principles, for, apart from the lack of equality of representation of the provinces, the mode of appointment secured that the members selected would be men not likely to champion provincial rights, and the Senate has never shown any special activity in this regard. It has failed also to carry out the idea that it might be the home of elder statesmen, whose calm prudence would be a valuable aid to the lower house. As it has none of the authority in treaty matters and appointments of the United States Senate, it has attracted none of the younger politicians. Membership is the reward of party services, normally in old age; it may be given to generous benefactors of party funds, or to business men whose presence there is expected by some great corporation to further their interests in legislation. Appointments are purely party; Sir J. Macdonald once deviated from this rule, Sir W. Laurier, Sir R. Borden, and Mr. Bennett never.

The purely partisan character of the Senate has resulted in the rule that it accepts the legislation of the party without serious dissent, and that it attacks, when there is a change of régime, the legislation sent up to it with a vigour which dies away as the members, usually old, die off and are replaced by nominees of the new Government. Hence in 1913 the Senate destroyed the proposal of Sir R. Borden to contribute 35 million dollars in emergency to the British navy as retribution for the defeat of Sir W. Laurier in 1911. In due course the majority became Conservative and the Liberals suffered retribution. Not content with rejecting a

<sup>1</sup> The unreformed Senate and suggestions of reform are discussed in Dawson, *Const. Issues in Canada, 1900-1931*, pp. 239 ff.

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money Bill, as in 1912, the Senate set up the claim and exercised it successfully to amend such Bills. It rejected in 1922 and 1924 the proposal to build branches of the Canadian National Railway, which it doubtless correctly deemed a mere bait to the electorate, and in 1925 it drastically amended the Bill making appropriation to relieve the sufferers from the disaster affecting the Home Bank, and the lower house had perforce to acquiesce. Many other measures both financial and general have since been examined critically, though not so drastically by the Senate, which delayed for a long time the relief of the establishment of a divorce court desired by Ottawa in lieu of divorce by Act of Parliament, a proceeding in which the Senate had taken upon itself the business of examining the justice of claims. It still must exercise this function for Quebec. In 1935-6 it was hostile to Mr. Mackenzie King's Bills.

That the Senate is satisfactory no one claims,<sup>1</sup> but to amend its constitution is practically hopeless. An Imperial Act could only be based on an agreed scheme which has never been approached. Election by the provincial legislatures, or nomination by their Governments, or as regards a third by the leader of the federal Opposition or by various interests, learned institutions, and so on, have been mooted, but the chance of change is negligible as matters stand.

In the case of the *Commonwealth* the federal principle is in form preserved. The Senate consists of thirty-six senators sitting for six years, one-half retiring every three years, elected by the whole of each State as a single electorate on the system of preferential voting, each elector being now, by Act No. 9 of 1936, compelled to vote for the whole of the candidates in order of preference. There is no property

<sup>1</sup> For a complaint in 1934 see *J.P.E.*, 1934, pp. 862-5. Mr. Mackenzie King has always held that departmental ministers must be in the Commons.

qualification, and the rules as to the electors and members are as for the House of Representatives. The powers of the Senate are normally equal with the lower house. But it may not originate any taxation or appropriation measures, it may not amend any Bill imposing taxation or appropriating moneys for the ordinary annual services of the Government, nor any Bill so as to increase any proposed charge on the people. But it may suggest amendments to any Bill which it cannot amend, and its power of rejection is unimpaired. Nor can it be affected by the tacking of irrelevant matter; Bills for the ordinary annual appropriation must not deal with anything else; taxation Bills must contain no extraneous matter on pain of invalidity, and must deal with one subject of taxation only unless Customs or Excise duties are concerned.<sup>1</sup> Hence the Senate at one time exercised the widest powers in tariff matters, for it need not yield if its suggestions are objected to and matters were normally settled by compromise. The Senate, therefore, had virtually power to amend, but by delaying submission of Bills to the Senate and collecting the taxation meanwhile, its control has been reduced.<sup>2</sup> For deadlocks between the houses there is the provision that, if a Bill is rejected twice, with an interval of three months intervening, by the Senate, the Governor-General may dissolve both houses; if the Bill is then rejected, the issue may be laid before a joint session at which it will pass if it secures an absolute majority of the total numbers of both houses. The procedure has once been

<sup>1</sup> Cf. *Osborne v. Commonwealth* (1911), 12 C.L.R. 321, which suggests the invalidity of Acts contravening this section 55; *Jolly v. Federal Commr. of Taxation* (1935), 53 C.L.R. 266; *Federal Commr. of Taxation v. Trautwein* (1936), 56 C.L.R. 211.

<sup>2</sup> In 1934 the Customs Act fixed a six-months' limit to operation of tariff proposals unless validated by tariff Act or special validation Acts; many of the latter have been necessary.

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used in 1914, when the result was to inflict a crushing defeat on the Government of Mr. Cook. In constitutional proceedings either house in theory can secure a reference to the people, but in practice only the lower house can exercise the power, as we have seen above.

The Senate has completely failed to act as a protector of the rights of the States, nor has it attracted politicians of any high order, who prefer the lower house in which reputation and office can be won. The mode of election has turned out quite unsatisfactorily; the number of seats won corresponds very poorly as a rule to the number of votes cast for the different parties, so that there is a permanent possibility of strong discrepancies in the size of the Government party in the houses. If the Government has a majority in both, the upper house is of little service; if it is in a minority, there is constant risk of serious friction, as under Mr. Scullin's Government when he contemplated seeking a double dissolution to secure a majority if possible in the Senate. In its early days Labour, by its superior organisation, captured an undue proportion of seats, but from 1919 to 1922 it had but a solitary representative and, even though things improved in 1922, it has never since been in a position in accordance with its strength in voters. It has thus been possible for the Senate to exercise a wise restraint on the measures of Labour; it improved in 1930 considerably the legislation as to conciliation and arbitration and opposed an effective refusal to the more unsound of the Labour financial proposals in Mr. Scullin's administration. Moreover, its financial powers have secured the adoption of the system of referring all projects involving expenditure of over £25,000 to a Public Works Committee representing both houses,<sup>1</sup> where the matters involved can be properly sifted

<sup>1</sup> See Act No. 92 of 1936.

and the issue decided with proper knowledge of the financial issues.

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Despite doubts expressed by Sir R. Baker and Sir S. Griffith, the Senate has acquiesced in the constitutional usage for the lower house to control the ministry, though it is perhaps too much to say that it has succeeded only in avoiding difficulties by ceasing to be a States house.

The *Union of South Africa*, despite the fact that it is not a federation, made in the constitution of the Senate a remarkable concession to the federal ideal. Under the constitution the selection of senators now lies with the members of Assembly for the province in joint session with the Provincial Council, presided over by the Administrator, voting being on the preferential system with the single transferable vote. Senators<sup>1</sup> hold office for ten years or until the next dissolution of the Senate; it may be dissolved simultaneously with the lower house or within a hundred and twenty days thereafter, thus giving a new Government, elected as the result of a general election, an opportunity to get rid of a hostile Senate. The number of members for each province is eight, and qualifications include age thirty at least, residence for five years, and ownership of land to the value of £500 at least. There are further eight senators nominated by the Governor-General in Council, of whom four are to be selected on account of their thorough acquaintance by reason of official experience or otherwise with the reasonable wants and wishes of the coloured races in South Africa. These senators hold office on the same terms as their elected colleagues, but need not comply with the property holding. Moreover, they can be changed on each advent to office of

<sup>1</sup> See Senate Act, 1926 (No. 54) passed by General Hertzog. The special representatives of the natives cannot vote at senatorial elections.

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IX. a new Government, a provision devised to secure that General Hertzog should not be compelled to accept as senators men who shared the more enlightened views on native policy formerly professed by General Smuts. The addition of four representatives of the natives has been noted above.

The powers of the houses are in the main nominally equal. But the Senate may not originate or amend money Bills, nor any Bill so as to increase any proposed charge. On the other hand, the Bill appropriating money for the ordinary annual services must not contain other matter, a provision intended to leave intact the right to reject a Bill containing an unusual proposal. In case of disagreement, however, the Governor-General may summon a joint session of the two houses in the same session after two disagreements in the case of money Bills, and it may be carried by a simple majority; if the Bill is not a money Bill, a joint session is possible only after the Bill has twice been rejected or unacceptably amended in two sessions. In either event the power of the Senate is minimal, for with 44 members against 153, and with the certainty that 8 of the 44 will be governmental nominees, the chance of the lower house being defeated is never very large. The only case where the Senate has more weight is when the issue is the very unlikely one of an attack on the equality of official languages, for then a two-thirds majority of the total members of both houses is requisite<sup>1</sup> to pass a constitutional amendment.

There is no doubt that the Senate has proved of no great importance. It was not intended to be more than a house of review, and in that capacity it serves fairly well. But it does not attract talent, and its most useful work was done when, after the defeat of General Smuts in 1924, it was able to

<sup>1</sup> By constitutional convention, not strict law.

oppose obstacles for the time in the way of such legislation as the measure which ultimately was passed as the means of excluding by law persons of colour from skilled employment at governmental discretion. Since the change in its position under the legislation of 1926 it has been more in accord with the lower house.<sup>1</sup> Plans to strengthen its personnel as opposed to its powers have been mooted. None has won any general acceptance.

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(3) Of the non-federal houses *Quebec* preserves a nominee house of 24, the members holding office for life, and having the same qualifications in general as in Canada. Its work is unobtrusive and it has escaped serious attack or commendation. The *Newfoundland* Legislative Council has had a very different history from the early days of its creation, when it quarrelled steadily with the lower house. It is nominee, and, though formerly the Imperial Government controlled the increase of its membership, that practice is now obsolete. Its legal powers originally rested on the supposed analogy of the British House of Commons. In 1917 a quarrel over an Excess Profits Tax Bill resulted in the enactment of a measure which placed it in precisely the same legal position as is occupied by the House of Lords under the Parliament Act, 1911. Its existence is since 1934 in suspense.

The Legislative Council of *New Zealand* now rests on the basis of nomination, members holding office for seven years, with the possibility of reappointment.<sup>2</sup> It is left to conven-

<sup>1</sup> For the avoidance of seeking its concurrence in ratification of the Kellogg Pact, 1928, and the German treaty of that year, see Keith, *Journ. Comp. Leg.* xi. 252, 253. Since the coalition of 1933 and fusion of parties in 1934 naturally friction has diminished.

<sup>2</sup> The number is not fixed by law: 40 is the average but in 1933 it had been allowed to fall to 20. It has now been increased in size, partly to secure Labour representation, 14 members being added, March 9, 1936.

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tion to regulate its powers; the lower house claims that it is possessed of sole control over money Bills. In 1914 an elaborate measure was passed to provide for the election of a house of forty members by proportional representation, with provision for solution by joint session of disputes over Bills other than money Bills, which were to be in the sole power of the lower house; but the Act has never been made operative, and it seems improbable that any such change is now desired. The Council, which includes men of ripe experience like Sir F. Bell and Sir James Allen, acts most usefully as a revising body; it has long since ceased to contend with the lower house on matters of principle as opposed to detail. It has recently shown itself sensitive to the encroachments of the lower house under the assertion of privilege by appointing a Committee to aid the Speaker of the Council in countering such claims when unduly pressed. But its attitude to the Labour Government in 1936–7 proved loyal acceptance of the decision of the electorate.

The weakness of New Zealand is not seen in the case of Australia, save formerly as regards Queensland, where it was abolished in 1922, and until recently *New South Wales*. The Council there was constituted on the basis of nomination, without limit of numbers, with the inevitable result that of late years the practice of swamping had been resorted to. The result had been to render the Council larger than the lower house, as opposed to the proportion of a half once held wise. Its powers in finance were limited only by convention, and difficulties were not unknown.<sup>1</sup> Though weak, it was decidedly a check to Labour schemes. Efforts to destroy it by swamping were the order of the day under Mr. Lang's influence, and it was therefore natural that the

<sup>1</sup> For the controversy of 1928 regarding amendments to money Bills see Keith, *Journ. Comp. Leg.* xi. 255 f. It has now no power in finance.

Government of Mr. Stevens, when it attained power in 1932, was determined to place the Council in a position which would render it immune from such attacks, and, it may be added, incidentally provide the opposition to Labour with a valuable element of support for several years to come. This was accomplished by the passing of an Act which by no great majority secured in 1933 acceptance by the referendum, which had earlier been made a condition prior to any assent being given to any Bill regarding the constitution of the Council. The Council now consists of 60 members who are elected by the two Houses of Parliament. Their tenure is for twelve years, one-fourth retiring triennially. The first reconstitution of the Council of April 23, 1934, provides for four groups of 15 elected for three, six, nine, and twelve years respectively. As they were elected under the auspices of a Parliament with a majority for Mr. Stevens, a certain Conservative influence is secured for some considerable period, even if the Labour party should be victorious at the next general election. Deadlocks are solved by referendum.

The measures to effect this change did not go unchallenged.<sup>1</sup> They comprised the Constitution Amendment (Legislative Council) Act, 1932, and the Constitution Further Amendment (Legislative Council Elections) Act, 1932, and it was contended that they were *ultra vires* in that they set up an electoral college consisting of the two houses and provided for secret ballot. The propositions in question were singularly untenable, and it was not surprising that the Supreme Court of New South Wales made short work of them, a course followed by the Privy Council in *Doyle v. Attorney-General for New South Wales*.

The procedure by referendum had been devised in 1929–1930 by the Constitution Amendment (Legislative Council)

<sup>1</sup> *Doyle v. A.-G. for New South Wales*, [1934] A.C. 511.

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Act, 1929, and the Constitution Further Amendment Act, 1930, as a security, and its success resulted in the passing by Queensland in 1933 of a Constitution Act Amendment Act which provides that no Council can be erected nor the duration of Parliament extended without a referendum. This measure was instigated by fear that the opposition to Labour, if successful at the next election, might restore the Council and prolong the duration of Parliament to secure it a substantial term of office. There is no reason to suppose the fear justified, but the Act is a useful safeguard against the extension of the life of Parliament without a mandate. The action of the Government of New Zealand in extending to four years without a mandate the duration of the legislature in 1932 had been widely attacked by Labour in that Dominion.

In the other States the upper houses rest on election. The principle is to have an electorate of more restricted character than the lower house, and to exact special qualifications of members. Thus *Victoria* requires ownership of freehold worth £50 a year from members, and electors, if not graduates or professional men, must own freehold rated at £10 or occupy leasehold rated at £15 a year. There are 34 members, elected two for each district, 7 metropolitan with 38,000 voters, 10 country with 21,000, holding office for six years, one-half retiring every three years.<sup>1</sup> *South Australia* requires age thirty and three years' residence from members, while electors must be at least occupiers as owners or tenants of a dwelling-house or own a £50 freehold, or be £20 leaseholders, etc. There are 20 members elected, four for each district, for six years, half retiring every three

<sup>1</sup> Voting was made preferential in 1936 and compulsory in 1935, as it had been very limited, less than 30 per cent in 1934. Preferential voting is restricted to the case of a dissolution affecting all the members.

years.<sup>1</sup> Tasmania demands age thirty from members, and electors must be possessed of professional qualifications, or be holders of freeholds of £10 a year or leaseholds of £30. The number of members is 18, for fifteen districts, 3 retiring annually, and the term being six years. Western Australia also requires age thirty of members, and electors must be £50 freeholders, or leaseholders or occupiers of £17 value, or Crown leaseholders of £10 value. The number is 30 elected for ten districts, the term six years.

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In all these cases the upper house is strongly entrenched and its power has normally been freely used. Victoria was the scene of two famous controversies in 1865–8 and 1877–9, when the Imperial Government insisted on the right of the Council under the constitution to reject, though not to amend, money Bills, and censured efforts to evade this right by tacking or by paying out money without sanction of law, or by submitting to judgment in the courts in claims for salaries of Civil servants, and paying on the strength of these submissions. In 1903 a compromise was arrived at. The Council made concessions as to franchise and lowered the high qualification for members. In return it was allowed to deal freely with clauses in Bills imposing penalties, or enacting fees or appropriating such fees, and to suggest amendments to money Bills. Moreover, a deadlock provision was made. The Governor may, if a deadlock occurs, dissolve the Assembly on that account, and then, if the Council still remains recalcitrant, may dissolve both houses, but not in the case of a constitutional change. This clumsy procedure is no check on the Council, and it has ever since freely exercised its discretion as regards rejection of unsound financial

<sup>1</sup> But the extension to five years of the present Assembly's duration by Act No 2141 (1934) results in postponing to 1938 retirement of members due to retire in 1936.

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IX. proposals, as in 1925 when it refused to be moved by threats of resignation from rejecting repeatedly the unwise financial expedients of Mr. Allan's ministry. In 1937, however, fresh efforts to secure more workable deadlock provisions were made, and the periodic election in June left the United Australia party with only 17 seats to 10 of the Country party, Labour 4, and Independents 3. A dissolution of the Assembly was given in October, but did not materially strengthen the Government.

*South Australia* in 1913 provided an ingenious rule as to the powers of the Council. An appropriation Bill which, like every other money Bill or money clause in a Bill may only be introduced in the Assembly, must not contain proposals not relating to purposes previously authorised, e.g. by inclusion in a previous Appropriation Act, if it is to be exempt from criticism by the Council. Otherwise, while the Council may not amend a money Bill or clause, it may suggest change or addition, and it may send down a Bill with a money clause in erased type asking for insertion by the Assembly and the Assembly may comply with any such request. But, if a Bill receives the Governor's assent, it is valid, whether or not there has been irregularity in its passage. For deadlocks it is provided that, if the Council rejects a Bill and after a general election it again rejects the measure, the Governor may either dissolve both houses or summon ten members to the Council, two for each division. This machinery has not yet been put into operation, and its elaboration secures the Council against any prospect of being easily overridden.

In practice the Council has maintained a steady control; the Act of 1913 represents a concession of minimal importance made after two vain attempts in 1906 and 1910–11 to induce the Imperial Government to introduce legislation to

override the opposition of the Council to reforms which would weaken its power of control. The British Government naturally refused to act, on the sound grounds that the requests for change had no sufficient majority to support them, and that the constitution had not in fact proved unworkable, so that interference could be justified on the only possible ground, necessity. Hence the Council maintains still its unassailable position. It has refused to render the franchise lower so as to change its complexion; it has refused to enact deadlock provisions enabling the Assembly to override it by thrice passing a Bill; and it has even refused to allow the lower house to reconstitute itself on the basis of proportional representation. It cannot be said that its action has been seriously unpopular. The upper houses in the States are calm businesslike bodies, representing a certain degree of property, and they act as a wise check on the more reckless proposals of the lower houses.

The same remark applies to the upper house of *Tasmania*, where the constitution left undefined its powers. On the score of its elective character the Council exercised control over money Bills, until in 1924–5 occurred the events already referred to,<sup>1</sup> when an Appropriation Bill and an Income Tax Bill were both assented to by the representative of the Crown, though the Council had passed neither. The utter illegality of this course has been pointed out, but the crisis was solved by the adoption of a compromise between the houses. An Appropriation Bill may not contain any clause not dealing with the ordinary annual supply; if any other provision is contained in it, it shall be void. Income Tax and Land Tax Rating Acts shall contain no other provisions, or they shall be void. Bills of these kinds the Council may not amend, nor may it amend any other measure so as to

<sup>1</sup> See p. 229, *ante*.

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increase or impose any burden on the people or appropriate revenue. But it may suggest amendments where it cannot make them. The Act is clearly, it may confidently be asserted, without real legal value, for on the principle laid down by the Privy Council in the case of *McCawley v. The King*<sup>1</sup> it appears that the courts could not refuse to give effect to measures, which were passed by the two houses, merely because in so doing they had disregarded these rules. They must therefore be deemed to be constitutional principles which the upper house is entitled to enforce, but which it is bound to respect as based on an accord between it and the Assembly. In all other matters the Council retains its authority unimpaired. Moreover, with proportional representation, it can hardly happen that the lower house can be in such serious opposition to the upper house as to justify drastic measures against the latter.

In *Western Australia* in 1921 the same rules as regards the relations of the two houses as are in force in the Commonwealth were adopted, but the value of the measure is open to the gravest doubt. In the case of the Commonwealth the validity of the enactments was secured by the doctrine of repugnance to Imperial legislation, and the maintenance of the *status quo* as regards the constitution seems to be secured by the Statute of Westminster, though this is not wholly free from doubt. The Western Australia Act, however, is a local Act and it can, on the principle of *McCawley's* case, presumably be overridden by any subsequent Act, at any rate expressly if not by mere implication, as may well be the case. In fact the upper house is immune from coercion by the lower, and it has continued to exercise a

<sup>1</sup> [1920] A.C. 691. It is different in the Commonwealth, for the constitution rests on an Imperial Act, and cannot be amended by ordinary legislation either expressly or tacitly.

moderating influence on the lower house when, under Labour auspices, that house has endeavoured to advance too far on the path to State Socialism, which in Western Australia, as in Queensland, has been operated with singularly little profit to the State and much expense to the taxpayers through the inability of the Government effectively to manage business undertakings.<sup>1</sup>

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(4) The disappearance of the *Irish* Senate of the constitution of 1922 in 1936 renders discussion of its constitution and powers needless. It was to rest, after the first construction, on the principle of election by the people as a whole, but that proved disastrously ineffective, men of distinction having no chance against popular figures of political unimportance. In 1927-8, therefore, election by the two houses was substituted with rather better results. The number was to be 60, nine years' tenure, with retirement of a third triennially, members must be over thirty years of age. In money matters the Senate had merely a power of recommendation and the Dáil could pass such a Bill after twenty-one days without regard to the recommendations. In other Bills the Senate had a power of delay up to eighteen months; then the Dáil might send it up again and it could be passed over the head of the Senate after two months. If, however, there were a dissolution, the Bill could be sent up forthwith without regard to the period of eighteen months.

The Senate as thus constituted could, and did, make useful minor amendments, but it had no power to resist serious measures, such as that for its own destruction. It may be doubted if such a chamber were worth while, and the Committee which investigated the issue of a second chamber favoured it having power to require a referendum on constitutional measures.

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916-1935*, p. 278.

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IX.** The Constitution of Éire, therefore, includes a Senate of 60 members, of whom 11 are appointed by the Prime Minister with their prior consent, 3 by the National University of Ireland, and 3 by the University of Dublin, thus restoring the University representation abolished for the Dáil in 1936. The remaining 43 fall to be elected by secret postal ballot, on the system of proportional representation with the single transferable vote to the number of from 5 to 11 from five panels, to be constituted by law, representing national language and culture, education and professional interests; agriculture and allied interests and fisheries; labour, whether organised or not; industry and commerce; and public administration and social services. The electors were to be every candidate for the Dáil at the last general election who received more than 500 first preference votes, or was elected unopposed; the number of votes was to be determined by law.<sup>1</sup> But as passed the matter is left to legislation. Election by functional or vocational groups or associations or councils may be substituted for election in this manner.<sup>2</sup> A new Senate election must be held within ninety days after the dissolution of the Dáil, and members of the Senate hold office until the day before the polling day. The qualifications of members are those of members of the Dáil.

The powers of this curious body whose composition depends largely on future laws are decidedly limited.<sup>3</sup> It may amend any Bill sent from the Dáil except a money Bill, and it may initiate Bills which must be considered by the Dáil, such Bills being deemed initiated therein if amended by the Dáil. But in money Bills it has twenty-one days only within which it can make recommendations which the Dáil

<sup>1</sup> Art. 18 (7) of draft. See Preface.

<sup>2</sup> Art. 19.

<sup>3</sup> Art. 20. A Senate fails to be created after the constitution takes effect.

may or may not accept. A money Bill is defined on the usual lines of the Parliament Act, 1911, to cover taxation, the imposition of charges on public monies, supply, appropriation, audit, custody of public monies, raising or guaranteeing loans, and subsidiary matters. The certificate of the Chairman of the Dáil is conclusive, unless challenged by a resolution of the Senate passed when not less than thirty members are present, when the President, after consulting the Council of State, may refer the issue to a Committee of Privileges of the two houses, presided over by a Supreme Court judge with power to give a casting vote only. The report must be given within twenty-one days of the sending of the Bill to the Senate, so that no delay is possible.<sup>1</sup>

As regards other Bills, not containing constitutional amendments, at the proposal of the Prime Minister based on the ground that the Bill is immediately necessary for the preservation of the public peace or security, or by reason of the existence of a public emergency, domestic or international, and on the resolution of the Dáil, if the President after consulting the Council of State concurs, the time for consideration by the Senate may be reduced to such period as is resolved. But such a measure remains operative only for ninety days, unless continued for a time specified by resolution of both houses. This is an important emergency power only.<sup>2</sup> In the case of other Bills the period allowed for consideration by the Senate is ninety days only, for the Dáil after that period of time may, within 180 days, resolve that the measure shall be deemed to be passed by both houses.<sup>3</sup> This gives a minimal authority to the Senate, but it is slightly strengthened by the further provision that within four days of the measure being deemed to have passed, the President may, on the petition of a majority of

<sup>1</sup> Arts. 21, 22.

<sup>2</sup> Art. 24.

<sup>3</sup> Art. 23.

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The value of the new body is clearly small, but it may do something in the matter of the amendment in detail of Bills, and, if the President is helpful, may secure a referendum on dangerous projects. But its power in the latter matter is too slight, and it is fortunate that as regards changes in the constitution a referendum is normally to be necessary.

(5) On the relation of the electorate to members there are in the Dominions as elsewhere two competitive views, that which seeks to make the member a delegate, and that which treats him as a representative, expressing the views of his constituents with a considerable range of freedom of judgment. The theory of the matter as set out by Burke in his famous letter to the electors of Bristol in 1774 is well known. There is a definite tendency in the Dominions to stress the delegation theory to a wide extent, and in the case of Labour in Australia the requirement that a member should leave with the party executive a signed resignation, available for use against him if he fails to vote on any issue as decided by the party caucus, has been noted. The same idea was accepted by the Farmers' conventions in western Canada in 1919, when the difficulty was that members elected by farming interests had adopted towards the budget proposals of the ministry views which were not in accord with the desire of the farmers for an immediate and drastic

<sup>1</sup> Art. 27.

revision of the tariff downwards. The members assailed contended that their action was in favour of accepting action by instalments, since otherwise they would have had to take the responsibility of destroying the Government and precipitating an election in June, before the demobilisation was complete and before proper machinery existed for taking the votes.<sup>1</sup> On the whole this represents the general Canadian view rather than the demand for subservience by the representative to the electors.

The farmers, however, pressed their views, and members were found who were willing to agree with informal committees of the electorate that, if they did not in Parliament give effect to the views of the committee which was to keep in touch with local feeling, they might have to resign their seats, if so requested by 40 per cent of the number of voters who voted at the last election. Very strong resentment was not unnaturally evoked by this mode of procedure, and it was proposed in 1920, in the discussions of the proposed Franchise Act, to disqualify any person who entered into any agreement of this kind. Mr. Fielding deprecated any legislative action but disapproved the recall in any form, and Mr. Hocken forcibly denounced the agreements of the type mentioned, asserting that they were no better than an agreement with fifteen manufacturers to resign if called upon to do so, since they had provided the election funds necessary.<sup>2</sup> None the less the idea persisted in the west and has taken legislative shape in Alberta. The idea, of course, is from the United States, where it is part, with the initiative and the referendum, of the movement to secure democratic control of legislation, and the influence of the United States on the west is naturally very strong.

<sup>1</sup> Dawson, *Const. Issues in Canada, 1900-1931*, pp. 187, 188.

<sup>2</sup> *Commons Debates*, April 13, May 5, 1920.

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The Legislative Assembly (Recall) Act, 1936, is a very guarded measure. Any ten persons whose names appeared on the voters' roll at the last election for the constituency may obtain forms of petition for recall from the clerk of the Executive Council. They then must canvass for petitioners, and if they secure  $66\frac{2}{3}$  per cent of the number on the voters' roll, they may lodge the petition with the clerk, who informs the member and the Chief Justice. The latter investigates the petition, and, if satisfied that all the forms have been duly observed, declares the seat vacant. An election then falls to be held, at which the former member may stand in the ordinary way. The high number of voters renders the use of this device unlikely to be very successful, but it is not satisfactory that, while the petition may contain a summary of the grounds on which recall is demanded, no reply may appear thereon. In the United States it is customary to allow a brief reply, but there the percentage of votes may be as low as 25, whereupon the member attacked may resign, or may stand at a fresh election against other aspirants. The whole idea is not attractive and its success is improbable.<sup>1</sup> Still less is it likely to become normal elsewhere in Canada or the other Dominions. It has been discussed but sporadically and ineffectively in Australia.

There is, however, no doubt that members in the Dominions are more closely under local control than in the United Kingdom. That is due to the view, especially strongly felt in Canada, under United States influence, that a member should be a local man, who, therefore, is necessarily far more inclined to bend an ear to local views than an

<sup>1</sup> Keith, *Journ Comp Leg.* xix 111, 112. Politics in Alberta in 1937 were very curious. The Premier could not secure his budget proposals until June, and then only under arrangements for the devising of a policy by a committee more in accord with Major Douglas' views on social credit, that system is hardly practicable in a country which has no control of currency.

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outsider, who in the United Kingdom is often preferred to a local aspirant. One reason for the position is no doubt rooted in history. It is reminiscent in Canada of the day when a member's chief purpose was to obtain money grants for local works, roads, bridges, public buildings, and so forth in his constituency. For such purposes men wanted not a philosopher, but a man familiar from his personal experience with where the shoe pinched. Such members were, to the suspension of responsible government, the order of the day in Newfoundland, and they are common enough in the Canadian provinces, and nowhere unknown.

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## CHAPTER X

### THE LEGISLATURES—POWERS, PROCEDURE, AND PRIVILEGES

**Chapter X.** As in the United Kingdom, though legislation is the essential work of the legislature, it has the vital function of control of the ministry and thus of the executive government of the country. Over the judiciary it has the power of securing the removal of peccant judges—happily its use is minimal; moreover, it can remedy the defects of the law as revealed in judgments, or the errors of judges in interpreting the laws, by legislative enactment, altering the law or declaring its true meaning.

(1) As we have seen, the existence of the ministry depends on the goodwill of the lower house of Parliament. This tradition has remained effective even in the federations, despite the suggestion of experts that the scheme was incompatible with the authority of an elective Senate, as in the Commonwealth, and the proposal of Mr. Playfair that the ministry there should be subject to the control of both houses, an idea which reappeared at the Indian Round Table Conference. On the other hand, the power of the ministry over the lower house cannot be ignored. The ministry may feel that it owes its position rather to the party in the country than to the legislators. They are sent to the house not to choose but to follow the leader of the party. The ministry has the right to allocate Parliamentary time, to decide the order of measures to be dealt with; it

can in many ways help and reward materially a loyal and Chapter X  
punish a negligent supporter; if he continues recalcitrant, the party will reject him as its candidate at the next election, and the ministry can normally threaten malcontents with a dissolution, involving termination of pay and the prospect of a new contest without party funds to back him.

Formally there are, of course, sufficient opportunities for members to challenge ministers. The British practice of an address from the throne, followed generally, though not in the Irish Free State, affords opportunities of hostile amendments; finance measures are, as in the United Kingdom, made the subject of discussions based not on detail but on principle; motions for the adjournment can lead to debate, and on occasions of urgency a debate may be brought on with but short notice to the ministry. Or formal motions of no confidence may be proposed, in which case they will normally be allocated an early date for debate. Questions equally serve to harass ministers, and to extract from them damaging admissions of irregularities in finance or treatment of personnel, or halting explanations of imprudent speeches, or suggestions that governmental favours may be purchased by votes. But normally the parties are too clearly defined to make such demonstrations count much in influencing votes; it is only when a party has begun to doubt the wisdom of its leader, as was the case in 1929 with Mr. Bruce's administration in the Commonwealth, that an adroit amendment may detach doubters and precipitate the resignation of the ministry, or, as in that case, an unsuccessful appeal to the electorate for a mandate to force through the threatened measure. The control of the Labour parties by the caucus system, and to some extent of the parties in Parliament by forces outside, add to the rarity of changes of political allegiance in consequence of debate.

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The actual choice of a ministry is not granted to any lower house, for, though the Dáil chose the President of the Council, it accepted his nominees for the other ministries without insisting on voting separately on each name proposed. But the Dáil had the power of preventing itself from being dissolved by a ministry which it disliked, for a dissolution could only be advised by a ministry commanding the support of the Dáil, and it was dubious if the Governor-General could properly dissolve if he knew that the Dáil had in fact objections to dissolution. In the crisis of 1927 it was clear that Mr. Cosgrave was not prepared to ask for a dissolution until he had made it clear that the Dáil still had for him a majority, however slight.<sup>1</sup> In the other Dominions no such power exists or is likely to exist, for the analogy of the British usage, insisted on in 1926 by the resolution of the Imperial Conference, gives a ministry a right to a dissolution after one defeat.

How far ministers will submit to the house their proceedings depends on their control of the house and on their ability to evade inconvenient demands of their opponents. Most ministries naturally desire as little comment as possible on the weak spots of their administration. Foreign issues seldom are made subjects of debate, unless legislation is necessary to secure carrying out of treaties, when it is insisted that the terms concluded must be accepted *en bloc* or rejected. Efforts of members to suggest amendments are as futile as in the United Kingdom, even in the case of the more informal agreements with other Dominions. Virtually in such cases the matter is not one of legislation so much as of confidence in the work of the executive which has had to

<sup>1</sup> The Constitution of Éire allows the President to grant a dissolution on defeat (Art. 13 (2)). The issue arose in December 1927 in view of Mr. De Valera's failure to secure a majority independent of Labour.

reconcile its own desires with the conflicting claims of the other party. Nevertheless such issues may raise serious difficulties, a fact which has resulted in the agreements between Canada and Australia and New Zealand of 1931-2 of ingenious provisions for allowing part to be abrogated without the destruction of the whole.

(2) The legislative powers of the Dominions have unquestionably been left by the Statute of Westminster in a somewhat complex position. The sweeping effect of that Act in its fullest sense would have left the Dominions with complete legislative power subject only to such limitation as arose from their status, for the Act by Sections 3 and 2 sweeps away (1) the territorial limitation of Dominion laws, and (2) the repugnancy of these laws to Imperial Acts. But this wide doctrine is immediately and drastically cut down by Sections 7-9, which safeguard the constitutions of Canada, the Commonwealth, and New Zealand, and by Section 10, which renders the changes in Sections 2 and 3 dependent on adoption by the Commonwealth, New Zealand, and Newfoundland. Moreover, the States of Australia are unaffected by the Statute, and the provinces are given no extra-territorial power, though the Colonial Laws Validity Act, 1865, no longer binds them. The only territories which thus have new constituent powers are the Union, Newfoundland, and the Irish Free State, but the latter was in 1931 held to be bound by the treaty of 1921, so that, as has been seen, in this vital aspect of legislative power the Statute has introduced but little change. Further, the Union has limited definitely in constitutional practice as opposed to law its power by asserting that the terms of the Union Act restricting the mode of alteration are binding as being the outcome of the agreement of the provinces when still colonies to unite.

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X. (1) The question then arises: Are there any forms of legislation which may be regarded as prohibited by the essential status of the Dominions? The answer to this enquiry is speculative, because it is not governed by any authority, and the effect of the resolutions of the Imperial Conferences, 1926-30, and the passing of the Statute must be regarded differently from conflicting standpoints. It must, however, be remembered that the legislature includes the Governor-General, and that, as representative of the Crown, he cannot with propriety assent to anything which severs from the Crown the Dominion. It seems therefore that, for this reason among others, the Governor-General should not assent to Bills which would alter the succession to the throne, and this is confirmed by the Statute of Westminster, which makes it clear that any such Bill should be based on agreement between the United Kingdom and the Dominions. If assent were given, the measure, it may be held, would not be a legitimate enactment but a declaration of independence. In the same way one should probably treat an Act to declare war—as does the Congress of the United States—or to make peace, if these measures were taken contrary to the action of the United Kingdom. They would be, even if assented to, extra-legal measures rather than exercises of the legislative power under the constitution. The same consideration applies to a measure to ensure the observances of neutrality, for it would forbid British subjects to give aid to the Crown contrary to their allegiance; it would authorise the officers of the ports to treat British vessels as belligerent, and to refuse them entrance or limit their stay; it would prevent the supply of provisions or munitions to such vessels for purposes of the effective continuation of their attack on the enemy, and so on indefinitely. Such a measure would mean that the Dominion,

however reluctantly, had decided to break away from its connection with the Crown. There are many steps short of these actions which might well be compatible with the continuance of allegiance. In all wars there have been mitigations of the severity of the measures applied against the enemy, and a Dominion legislature might easily think it fit to legislate to undo the effect of the common law in placing enemy subjects in a relation of non-intercourse and in forbidding trade with the enemy. The Crown, by the prerogative in the United Kingdom, has wide discretion, and the Dominion Parliament could vest such discretion in the Governor-General, though none of the prerogative may have been delegated.<sup>1</sup>

Beyond such instances as these there can be nothing in the status of a Dominion to justify doubt of its authority. The idea that there are other matters, connected with the prerogative, which are beyond Dominion competence, as, for instance, the view that the right to pardon could not be taken away from the Governor-General, is founded on older conceptions of the relations of parts of the Empire.

(ii) In the case of the Irish Free State, however, there were certain fundamental principles laid down as to the liberties of the subject. These will be dealt with below, but it is clear that a difficulty arose as to their effective protection by the constitution, after the Statute of Westminster, 1931, enabled the Irish Parliament to repeal the Imperial Act of 1922 approving the Irish Free State constitution.<sup>2</sup> The constitution thus rested on its own foundations, and this was formed by an Act of the Constituent Assembly of 1922. It might therefore be held that the constitution was a document superior to the legislature which it created, and that the courts could give effect to any doctrine therein laid

<sup>1</sup> See p. 159, *ante.*

<sup>2</sup> See pp. 178-83, *ante.*

Chapter X. down by holding *pro tanto* invalid any enactment which violated it.<sup>1</sup> Fortunately in the main the Articles were so expressed as to be capable of being overridden by an ordinary law, and it must be remembered that the constitution itself could be altered by an ordinary Act for at least sixteen years from its taking effect. It was therefore held sufficient then to enact what was desired, and to state that it was a constitutional amendment, so as to oust the rule that the enactment must be read subject to the constitution.

This view, of course, appears inconsistent with the power of repeal by necessary implication accepted by the Privy Council in *McCawley v. The King*,<sup>2</sup> but the issue there was that of repugnancy to an Imperial Act, and it was held that the power to alter the constitution given by the Colonial Laws Validity Act, 1865, was absolute and could be exercised by necessary intendment as well as by express change. That doctrine need not be accepted as applicable to a constitution which is enacted by a body claiming to be a constituent assembly.

The issue of the power in the absence of Imperial legislation of paramount character to make a constitution immutable save under a prescribed procedure will be directly tested under the Constitution of Éire. It is expressly provided that the Oireachtas shall not enact any law which is in any respect repugnant to the constitution or any provision thereof. Any law repugnant to the constitution is to the extent only of such repugnancy invalid.<sup>3</sup> The Oireachtas is also forbidden to declare acts to be infringements of the law which were not so at the date of their commission,<sup>4</sup> an

<sup>1</sup> This is held in *The State (Ryan) v. Lennon*, [1935] I R. 170, Keith, *Journ. Comp. Leg.* xvii. 272.

<sup>2</sup> [1920] A.C. 891.

<sup>3</sup> Art. 15 (4).

<sup>4</sup> Art. 15 (5).

admirable principle which was flagrantly violated by the Constitution (Amendment No. 17) Act, 1931. A curious position is created by certain guarantees which are freely given among the rights of the people, such as no endowment of religion,<sup>1</sup> and no compulsion on parents to send children to State schools<sup>2</sup> and so forth. How the courts would protect these clauses remains to be seen. The oaths<sup>3</sup> imposed on the judges to uphold the constitution would be more impressive as safeguards if the judges had not been sworn to uphold that of the Irish Free State, for the Constitution of Éire compels the resignation of any judge who is not prepared to swear to maintain the new constitution, and there is always the possibility that the invalidating of one oath may lead to the neglect of the new oath. The position is difficult, and all really depends on the sense of loyalty to the constitution of the people of Éire. It must be remembered that the constitution purported to be an exercise of the people's inalienable, indefeasible, and sovereign right to choose its own form of government,<sup>4</sup> an assertion whence it may be possible to draw diametrically opposed conclusions, the one asserting the binding force of the constitution, the other rejecting it as an effort to fetter that which is inalienable and indefeasible.

(iii) The rule of repugnancy,<sup>5</sup> as noted above, still applies to the Australian States, and, until formally extended in its operation by the Parliaments of the Commonwealth, New Zealand, and Newfoundland, was left operative by the Statute of Westminster for these territories. The essential doctrine of the Colonial Laws Validity Act, 1865, reduces repugnancy to the case where a colonial Act is repugnant

<sup>1</sup> Art. 44 (2).

<sup>2</sup> Art. 42 (3).

<sup>3</sup> Art. 58.

<sup>4</sup> Art. 1.

<sup>5</sup> Wynne, *Legislative and Executive Powers in Australia*, pp. 58 ff.

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 to an Imperial Act or a rule under it which extends expressly or by necessary intendment to the colony. It has been suggested in the Commonwealth<sup>1</sup> that the Act does not apply to Dominion legislation enacted under the constitution and passed subsequent to the date of the Act, and it was actually held that an Order in Council as to appeals under the Judicial Committee Act, 1844, was not superior in validity to the Commonwealth Judiciary Act made under the powers of the constitution of 1900. This view, however, is not that of the Privy Council, nor can it even be said to represent the view of the High Court. Sir A. Knox, C.J., and the four other justices had no doubt in the important case of *Union Steamship Co. of New Zealand v. The Commonwealth*<sup>2</sup> that the Colonial Laws Validity Act was of general application to the legislation of the Commonwealth.

There remains, however, the difficulty that repugnancy is not always easy to define. In the *Union Steamship Co.'s Case* the tendency of the majority of the High Court was to extend rather than limit the doctrine by making the decision rest on the broad ground that the Merchant Shipping Act, 1894, provided a code which it was not possible for a Dominion Parliament to alter in detail, even if the two measures could to some extent be made to work together. Mr. Latham<sup>3</sup> has stressed the similarity of this judgment to that adopted in dealing with the powers of the Commonwealth and the States in regard to industrial arbitration. At one time it was deemed that both State and Commonwealth awards might be upheld if they could be worked together; an employer ordered by the State to pay

<sup>1</sup> *Commonwealth v. Limerick Steamship Co.* (1924), 35 C.L.R. 69, 95, 96, 116. See also *Commonwealth v. Kreglinger & Fernau Ltd.* (1926), 37 C.L.R. 393. But see *Webb v. Outram*, [1907] A.C. 81, *Nadan v. R.* [1926] A.C. 482, 494.

<sup>2</sup> (1925), 36 C.L.R. 130.

<sup>3</sup> *Australia and the British Commonwealth*, chapter vi.

one rate, and by the Commonwealth to pay a smaller rate, Chapter X could comply with both by paying the higher rate as the greater included the less.<sup>1</sup> But in the dispute<sup>2</sup> between the New South Wales law providing for a 44-hour week and the Commonwealth award of a 48-hour week, the High Court adopted the view that the Commonwealth award must be deemed to cover the whole field and to require obedience to a 48-hour week standard. The issue depends clearly on each individual case, and does not admit of any simple doctrine, but the more sound view probably is that the repugnancy must be necessary and clear to invalidate the terms of a Dominion or State Act. There are very few cases where in the field of such legislation, apart from constitutional problems in the federations and the Union, the doctrine of repugnancy has been effectively pleaded. It has naturally often been invoked in vain, as when it was claimed that the Commonwealth could not levy land tax on leasehold lands,<sup>3</sup> because the States had by Imperial Act power to regulate the dealing with their lands, or that the New South Wales Government could not deal with Garden Island because an Order in Council of 1899 had mentioned that Garden Island had been dedicated in perpetuity for defence purposes.<sup>4</sup> Or again, an effort was made to show that Commonwealth collision regulations were incompatible with Imperial regulations,<sup>5</sup> and Magna Carta has, needless to say, vainly

<sup>1</sup> *Whybrow's Case* (1910), 10 C.L.R. 266.

<sup>2</sup> *Clyde Engineering Co. Ltd. v. Cowburn* (1926), 37 C.L.R. 466. Cf. *H. V. McKay Pty. Ltd. v. Hunt* (1926), 38 C.L.R. 308; *McLean, Ex parte* (1930), 43 C.L.R. 472, *Stock Motor Ploughs v. Forsyth* (1932), 48 C.L.R. 128.

<sup>3</sup> *A.-G. for Queensland v. A.-G. for the Commonwealth* (1915), 20 C.L.R. 148.

<sup>4</sup> *Commonwealth of Australia v. New South Wales*, [1929] A.C. 431.

<sup>5</sup> *Hume v. Palmer* (1926), 38 C.L.R. 441. The regulations were valid because s. 735 of the Merchant Shipping Act, 1894, allows a colonial legislature to regulate the shipping registered in Australia, and overrode New South Wales regulations; *Buller v. The Ship Millimumul*, [1930] N.S.W. S.R. 182.

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been invoked to control the legislation of the Commonwealth on immigration.<sup>1</sup>

(iv) The territorial limitation has caused considerable difficulty, for in the Commonwealth High Court it was for a time interpreted rather strictly, in accordance with the doctrine apparently contained in the decision of the Privy Council in *Macleod v. Attorney-General of New South Wales*,<sup>2</sup> and it is not quite clear how far the latest views of the Privy Council alter the trend of decisions of the High Court. The decision in *Macleod's Case* referred to the power of the legislature of New South Wales to provide for the punishment of bigamy committed outside the colony. The conviction was held invalid, and of course it must be contrasted with the decision in *Earl Russell's Case*,<sup>3</sup> where effect was duly given by the House of Lords to the British Act of 1861 making bigamy committed outside England by a British subject a criminal offence. The restriction thus laid down was met in part in the preparation of the Commonwealth constitution by giving powers which clearly must be extra-territorial in effect, control of lighthouses, etc.; of fisheries in Australian waters beyond territorial limits; immigration and emigration; influx of criminals; external affairs; and relations of the Commonwealth with the islands of the Pacific. Moreover, by Section 5 of the Constitution Act the laws of the Commonwealth were to be in force on all British ships, save the King's ships of war, whose first port of clearance and port of destination were in the Commonwealth.

None the less the High Court has not shown any inclination

<sup>1</sup> *Chia Gee v. Martin* (1906), 3 C.L.R. 649. In 1918 it was asserted in Quebec that only the Imperial Parliament could suspend the Habeas Corpus Act: *Blanshay, In re*, 24 R. de J. 578.

<sup>2</sup> [1891] A.C. 455.

<sup>3</sup> [1901] A.C. 446.

to extend unduly the ambit of power. The Privy Council in *Attorney-General for Canada v. Cain*<sup>1</sup> in 1906 laid down a more generous doctrine, that Canada had all powers necessary to deal with deportation of immigrants, including such measure of extra-territorial restraint as might be requisite. This was followed by the High Court in *Robtelmes v. Brennan*,<sup>2</sup> where it held that the Commonwealth had power to expel the Pacific islanders from Queensland, and during the war both New Zealand<sup>3</sup> and the Commonwealth<sup>4</sup> were held by their courts to have authority to legislate for their troops overseas, though this power could have been based on the specific power in this regard given by the Imperial Army Act.<sup>5</sup> New Zealand, however, in *Lander's Case*<sup>6</sup> reaffirmed the doctrine of *Macleod's Case* as regards bigamy committed outside New Zealand, overruling the argument of Sir J. Salmond in favour of a wider power, and the decision of the Chief Justice in the *Wellington Cooks' and Stewards' Union Case*<sup>7</sup> in favour of the power of New Zealand to regulate the actions of employers and employees on a New Zealand ship overseas. The High Court ruled in *Wienholz's Case*<sup>8</sup> that a Queensland Stamp Act could not, or at least must not, be construed to apply to a deed which was executed in England, and had never when operative been physically in Queensland. But it is not clear whether this doctrine is more than a rule of construction rather than an absolute negation of power to legislate by apt words, and the same difficulty applied to other judgments on taxation

<sup>1</sup> [1906] A.C. 542.

<sup>2</sup> (1906), 4 C.L.R. 395.

<sup>3</sup> *Semple v. O'Donovan*, [1917] N.Z.L.R. 273.

<sup>4</sup> *Sickerdick v. Ashton* (1918), 25 C.L.R. 506.

<sup>5</sup> Section 176 (11)

<sup>6</sup> [1919] N.Z.L.R. 305.

<sup>7</sup> (1906), 26 N.Z.L.R. 394.

<sup>8</sup> (1915), 20 C.L.R. 540 Cf *Commr. of Stamp Duties (N.S.W.) v. Millar* (1933), 48 C.L.R. 618, and contrast *Colonial Gas Assocn. Ltd. v. Federal Commr.* (1934), 51 C.L.R. 172.

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issues. Thus in the important decision<sup>1</sup> that the Commonwealth cannot tax a dividend on shares situate in England under its Income Tax law, the issue is not so much one of extra-territorial authority as the effect which in England is to be given to an attempt to tax property which is truly English; even if the Commonwealth has the fullest power of a foreign State, is it right to give effect to it in England? The problem is not solved by the Statute of Westminster, 1931, for it does not touch on the effect in England of Dominion legislation, but the effect in their courts.

It has also been found that the rule can easily be evaded. Thus, if it is not possible to forbid the breaking of Customs seals on stores on the high seas, still it is an offence to enter Commonwealth waters with the seals broken;<sup>2</sup> if it is not legal to punish bigamy committed outside Canada, still it is legitimate to punish persons who leave Canada in order to commit that offence abroad;<sup>3</sup> if persons not resident in the Dominion are parties to contracts to be performed there, it is legitimate to give judgments against them and execute them, even if these judgments would be refused execution in England as improperly obtained.<sup>4</sup>

To these considerations falls now to be added the strong view of the Privy Council in favour of the validity of the Canadian decision<sup>5</sup> to punish offences against Canadian Customs legislation committed on Canadian registered shipping within twelve miles of the coast of the Dominion. On many grounds it might have been possible to approve

<sup>1</sup> *London and South American Investment Trust Ltd. v. British Tobacco Co. (Australia) Ltd.*, [1927] 1 Ch. 107.

<sup>2</sup> *P. & O. Steam Navigation Co. v. Kingston*, [1903] A.C. 471.

<sup>3</sup> *Bigamy Sections, Criminal Code*, *In re* (1897), 27 S.C.R. 461; *R. v. Brinkley* (1907), 12 Can. C.C. 454. A like control is used in Fishery Acts, e.g. c. 42 of 1929.

<sup>4</sup> *Ashbury v. Ellis*, [1893] A.C. 339.

<sup>5</sup> *Dunphy v. Croft*, [1930] 4 D.L.R. 159; in Privy Council, [1933] A.C. 156 as *Croft v. Dunphy*. See also *Trenholm v. McCarthy*, [1930] 1 D.L.R. 674.

such legislation, including the right of the Dominion under the Merchant Shipping Act, 1894, s. 735, to regulate her registered shipping. But the Privy Council accepted the wide view that the only question was one which would apply equally to the United Kingdom, of the proper construction of a measure legitimately intended and in accordance with the practice of many countries, including the United Kingdom,<sup>1</sup> to make legislation against Customs offences operative within that limit of area. Thus it lays down clearly that in this matter and analogous cases there is no implication in the status of a Dominion, apart altogether from the Statute of Westminster, of inferior power to the United Kingdom.

There is no doubt that this decision will help to render the Dominion courts willing to consider favourably any legislation which can be said in some measure to bear upon the peace, order, and good government of a Dominion. This view is taken in *Trustees, Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation*<sup>2</sup> by Evatt, J., and the principle has been generally approved. The decision in that case was that it was not incompetent, under the Estate Duty Assessment Act, 1914–28, to require the inclusion in the total of an estate for death duties of the value of movables outside Australia which had passed from a deceased person domiciled at the time of death in Australia by gift *inter vivos* within a year before death. In like spirit the court has held taxation imposed on profits made outside Queensland valid to the extent at any rate that it is legitimate to allow

<sup>1</sup> See Wheaton, *International Law* (ed. Keith), i. 367. The Canadian Supreme Court has exercised jurisdiction over an American vessel captured in "hot pursuit"; *The Ship "North" v. The King* (1906), 37 S.C.R. 385; *Can. Bar Review*, ix. 182-5.

<sup>2</sup> (1933), 49 C.L.R. 220, see *Broken Hill South Ltd. v. Commr. of Taxation (N.S.W.)* (1937), 56 C.L.R. 337.

**Chapter X.** taxation to be levied on the profits of a company in Queensland where they cannot be ascertained exactly on the assumption that the Queensland profits are to the total profits in the same relation as the Queensland sales to the total sales.<sup>1</sup> Again, in *Crowe v. The Commonwealth*<sup>2</sup> it was ruled that legislation regarding the export and distribution of dried fruits was not invalid because the acts involved to some extent took place outside the Commonwealth, the subject matter falling clearly within the ambit of trade and commerce.

The question of extra-territorial power has also been incidentally discussed in connection with the legislative authority exercised by the Commonwealth and New Zealand over their mandated territories, but the issue depends there on other considerations which will elsewhere be discussed.

In the case of the Dominion of Canada the Parliament in 1933 (c. 39) provided that every Act in force, enacted before the Statute of Westminster, which in terms or by necessary or reasonable implication was intended, as to the whole or any part thereof, to have extra-territorial operation, shall be construed as if at the date of its enactment the Parliament of Canada then had full power to make laws having extra-territorial operation as provided by the Statute. It has not yet been the subject of judicial construction.

In the case of the Irish Free State the existence of the limitation has never been admitted for a moment. In *R. (Alexander) v. Circuit Court Judge of Cork*,<sup>3</sup> Fitzgibbon, J., expressly negated the application of the doctrine to the legislative powers of the Irish Parliament, and it has never since been admitted. The view of the State is that its legisla-

<sup>1</sup> *Australasian Scale Co. v. Commissioner of Taxes* (1935), 53 C.L.R. 534.

<sup>2</sup> (1935), 54 C.L.R. 69; Keith, *Journ. Comp. Leg.* xix. 114 f.

<sup>3</sup> [1925] 2 I.R. 165, 170.

tion has the same ambit as British, and the only question of difficulty which has been discussed arises from the interpretation of the operation of Imperial Acts preserved by Article 73 of the constitution or, as the courts prefer to hold, enacted as Statute law by the constitution. In *Keegan v. Dawson*<sup>1</sup> the issue was whether compensation was payable by an employer domiciled in the State to an employee likewise domiciled in respect of an accident happening in England. It was held by the Supreme Court, overruling the High Court, that it was payable either because the Act originally applied throughout the United Kingdom and was not altered in ambit by re-enactment, or because there was no reason to limit its operation as regards persons domiciled in the State and parties to a contract made therein. Fitzgibbon, J., favoured the doctrine of *The Zollverein*,<sup>2</sup> and *Cope v. Doherty*<sup>3</sup> in favour of the ambit of legislative jurisdiction extending to subjects anywhere. There is no doubt that, with the definition in the legislation of 1935 of Irish citizens, the State can easily define, by using that criterion, the bounds of her jurisdiction.

The extension of Commonwealth jurisdiction, by adoption as proposed of the Statute of Westminster, 1931, could not properly be held to apply to any but the express powers of the Commonwealth, nor could the Commonwealth claim unrestricted power to legislate on any topic extra-territorially. The States certainly have a strong claim if authority for extra-territorial legislation is given to the Commonwealth to be accorded it for their criminal law. Certain defects have been noted under the old state of affairs in Canada, where crimes affecting persons in Canada have been ruled to be not punishable therein, e.g. the sending of a letter to a girl in

<sup>1</sup> [1934] I.R. 232; Keith, *Journ. Comp. Leg.* xvii. 117, 118.

<sup>2</sup> (1858), Swab. 96.

<sup>3</sup> (1858), 4 K. & J. 367.

Chapter X. Canada with a view to her eventual seduction, and kindred offences<sup>1</sup>

It must be remembered that in the case of the Canadian provinces the local limitation is inherent in the Canadian constitution under Section 92 of the British North America Act, 1867, and that it remains despite the Statute of Westminster. The exact effect of the limitation is not easy to discern, but in respect of the power to levy death duties it is decided by *Brassard v. Smith*<sup>2</sup> that, where the only ground of taxation is presence of property in the province, as distinct from the presence therein of the legatee, the property cannot be taxed, unless on the principles of private international law it is there situate. So Quebec cannot levy a tax on shares in a Quebec bank if they are duly registered at Halifax, Nova Scotia, and transferable there, for the *situs* of a share is where it can effectively be dealt with. So in a famous case, that of the *Alberta and Great Waterways Railway Co.*,<sup>3</sup> it was ruled that Alberta could not confiscate by legislation funds in the Royal Bank at Edmonton because such action would mean depriving certain lenders of money of the right to secure payment from the bank at Montreal where their debt was situate, and thus was beyond provincial jurisdiction.

(v) Subject to these limitations the plenary power of the various Parliaments, including even provincial legislatures, is as extensive as the Imperial Parliament in its plenitude of power could convey. They are in no sense delegates of the Imperial Parliament, and they therefore are not bound by the rule affecting subordinate legislative bodies that *dele-*

<sup>1</sup> *R. v. Blythe* (1895), 1 Can. C.C. 263; *Gertie Johnson, In re* (1904), 8 Can. C.C. 243, *R. v. Hauberg* (1915), 24 Can. C.C. 297.

<sup>2</sup> [1925] A.C. 331. See Keith, *Journ. Comp. Leg.* xii. 280.

<sup>3</sup> [1913] A.C. 283 as *Royal Bank of Canada v. R.*

*gatus non potest delegare.*<sup>1</sup> They have wide discretion to choose to what extent their enactments are to depend for their operation on declarations by the executive. Thus in the *Welsbach Light Company of Australasia v. The Commonwealth*<sup>2</sup> it was energetically contended that the Commonwealth could not pass an Act penalising trading with the enemy, which allowed the Governor-General to prohibit any act. It is clear that the attack could at most touch only the validity of the view taken of what might constitute such trading by the Governor-General, and that to attempt to declare the Act invalid because of such a provision was impossible. So again it is for the Parliament to decide what measures it should enact for the peace, order, and good government of the territory, the words used in the constitutions to give authority to the Parliaments. Vainly in *Riel's Case*<sup>3</sup> was it pleaded that it must not be assumed that the Dominion of Canada was given authority to tamper with the law of treason, or diminish the safeguards provided for the accused in such cases by English law. No doubt in the High Court of Australia there have been dicta suggesting that it is the Court's opinion of what falls within a power that is to determine the validity of legislation, but that is clearly not the true doctrine. All that can be claimed for the courts is that, if they find a Parliament with defined powers, like that of the Commonwealth, dealing with a topic under the claim that it falls within a power when it certainly does not, the opinion of the court prevails.<sup>4</sup> It is not enough, as many Canadian cases show, that the Parliament should

<sup>1</sup> *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Powell v. Apollo Candle Co.* (1885), 10 App. Cas. 282; *Baxter v. Ah Way* (1909), 8 C.L.R. 626; *Riel v. The Queen* (1885), 10 App. Cas. 675, 678.

<sup>2</sup> (1916), 22 C L R. 268.

<sup>3</sup> (1885), 10 App. Cas. 675.

<sup>4</sup> *Whybrow's Case* (1910), 11 C.L.R. 311; Holman, *Australian Constitution*, pp. 8-10.

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claim to be exercising a power if in substance it does something else; for example, if it endeavours under cover of enacting criminal law to arrogate to itself the power of regulating the business of insurance. Nor again may it impose taxation merely in order thus to compel obedience to its efforts to control by licence that important occupation.<sup>1</sup>

The limits of the power of legislatures to create subordinate bodies with legislative authority are hard to determine. The question has been raised in regard to Manitoba legislation<sup>2</sup> to provide for the initiative and referendum, and it was held that the Manitoba Act attacked was invalid because it was provided that, if a petition for the repeal of an Act were initiated, and under the procedure in such cases approved by the legislature, the Act would stand repealed without the assent or veto of the Lieutenant-Governor being obtained; still less of course would the Governor-General have any power to disallow. This meant in short that an Act could be repealed without the assent of the Crown. As the province cannot alter its constitution as regards the office of Lieutenant-Governor, the Act was clearly an invalid effort to change his position vitally. On the other hand, incidentally, it has been indicated by the Privy Council that Alberta legislation for enactment of laws by the initiative is valid.<sup>3</sup> The argument is that the legislature is intended to enact what the people desire; if therefore a measure is prepared and approved by the electorate, it is proper that it

<sup>1</sup> *A.-G. for Canada v. A.-G. for Alberta*, [1916] 1 A.C. 588; *A.-G. for Quebec v. A.-G. for Canada*, [1932] A.C. 41. The power to tax and spend does not authorise Canada to create a system of unemployment insurance, [1937] A.C. 355.

<sup>2</sup> *Initiative and Referendum Act, In re*, [1919] A.C. 935. The Constitution of Éire, Art. 15 (2) (2), gives express power to constitute or recognise subordinate legislatures (*e.g.* for Northern Ireland).

<sup>3</sup> *R v Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128. The initiative is not included in the Constitution of Éire; it was provided for only as a possibility in 1922, and hastily abolished when the chance for its use arose in 1928.

should be passed by the legislature without the right to alter or reject. The objection that a legislature is intended to discuss and clarify the views of the electorate may be met by two considerations. In the first place, the Bill prepared by initiative is discussed by the legislature and may be rejected once; only then does it go to a referendum, thus giving the electorate the advantage of studying the legislature's opinions. Secondly, an Act of 1923 enables the legislature to decide several questions to be placed before the electors at the referendum when the voting is preferential, thus securing them a substantial measure of legislative guidance. How much further this process could be carried without finding the courts opposed it is impossible to conjecture. A legislature for a Dominion, it seems to be held, cannot properly extinguish itself, so that presumably it cannot hand over all its powers to another body, except by way of transforming itself by a constitutional change, and in the case of the Canadian provinces the power of change exists.

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It is of course entirely within the power of any legislature to decide that issues shall be settled by referendum, or to allow local option as regards the application of liquor control.<sup>1</sup> A classical example of the two systems is afforded by New Zealand, where the referendum has been employed triennially to decide the issue of prohibition or continuance or governmental management for the whole Dominion, while a system of local option is in operation. The referenda have so far failed to give the majority desired for prohibition.

The legislatures are not delegates of the people any more than of the Imperial Parliament, and accordingly there are no legal limits on their power to legislate without reference to the electors. This is illustrated above all in the power to extend the life of Parliament, the latest example of which,

<sup>1</sup> *Official Year Book of the Commonwealth*, xxii. 1005-8.

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the action of New Zealand in 1932, elicited the strongest protests, although the decision was merely dictated by the extreme financial difficulties of the time. But the danger to the electorate of this exercise of sovereignty is clear, as has been insisted upon above.

The plenitude of legislative power cannot, it is certain, be restrained by any principles of morality. Confiscatory Acts are valid if their intention is clear,<sup>1</sup> and judges will no doubt follow the English rule of not assuming that any Act is intended to take property without compensation, unless it is clearly so expressed.<sup>2</sup> In the Commonwealth efforts have been made to restrict legislative authority on the plea that it infringes the judicial sphere, but with little effect. It has been ruled that to expropriate property from an enemy subject<sup>3</sup> in pursuance of statutory regulations is not a judicial act, and it seems clear that the Commonwealth can enact retrospective laws. If it cannot reverse a judgment of the High Court, as that would perhaps infringe judicial power, it can declare the law to be otherwise than the interpretation of the Court, though it is doubtful if this could be done when litigation depending on the meaning of a statute was pending so as to oust the jurisdiction of the court.<sup>4</sup> The Irish Free State affords an example of legislation to declare that the Copyright Act, 1911, must be deemed to have been in force in the State during a period when its existence as law there was denied by the Supreme Court. At the same time proceedings in respect of infringement of

*Florence Mining Co. v. Cobalt Lake Mining Co.* (1908), 18 O.L.R. 275; for charge of wills, *Hammond, In re* (1921), 51 O.L.R. 149; Riddell, *Canadian Constitution*, pp. 14-16.

<sup>1</sup> Cf. *North Charterland Exploration Co. v. R.*, [1931] 1 Ch. 169.

<sup>2</sup> *Roche v. Kronheimer* (1921), 29 C.L.R. 329.

<sup>4</sup> Kerr, *Law of the Australian Constitution*, p. 33. In *Smith v. City of London* (1909), 20 O.L.R. 133, it was laid down that the province could stop any litigation once begun and any future litigation on a stated subject.

copyright in that period were forbidden on the score of Article 43 in the constitution, which forbids Parliament to declare acts to be infringements of the law which were not so at the date of their commission.<sup>1</sup> But in the Constitution (Amendment No. 17) Act, 1931, when the question was one of punishing *ex post facto* offences against the Government of the day, the provisions of Article 43 were deliberately overridden. Yet it is fairly clear that its purpose was to apply not to civil rights but to criminal law, and that its use in a civil issue was unconstitutional.

Another limitation which is apparently suggested as possible by the Privy Council in *Croft v. Dunphy*<sup>2</sup> is the view that a Dominion is not conceded the right by the Imperial Parliament to legislate contrary to international law. The issue was not decided in that case, for the Council held that the terms of the Customs legislation impugned were in accordance with international law, even apart from the fact that the vessel offending was registered in Nova Scotia, and no foreign element was thus involved. But the suggestion itself is clearly untenable. An implied limitation of this sort is really out of the question, for the simple reason that international law is too ill-defined to act as a criterion, and that no case has yet been decided on the basis suggested, while the duty of the British courts to give effect to British legislation despite objections on the score of international law is unquestioned.<sup>3</sup> As in England, Dominion courts doubtless will not interpret a statute as ignoring inter-

<sup>1</sup> The Copyright (Preservation) Act, 1929, ss. 1 and 4; *Performing Right Society Ltd. v. Bray Urban Council*, [1930] A.C. 377.

<sup>2</sup> (1932), 48 T.L.R. 652; [1933] A.C. 156.

<sup>3</sup> *Mortensen v. Peters*, 8 F. (Just.) 93, 101; *The Zamora*, [1916] 2 A.C. 77. Treaties must be approved by legislation to alter law see *Walker v. Baird*, [1892] A.C. 491; *A-G for New Brunswick v. C.P.R. Co* (1925), 94 L.J.P.C. 142, *R. v. Sylboy*, [1929] 1 D.L.R. 307, *Keith, Journ. Comp. Leg.* xi. 106, 107, *The Bathori*, [1934] A.C. 91; *Arrow River Co., In re*, [1932] 2 D.L.R. 216.

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Efforts have been made to invoke control of legislation by fundamental principles, such as the maxim *nemo tenetur se ipsum accusare*. But in *The State (McCarthy) v. Lennon and Others*<sup>1</sup> this excellent maxim was disposed of by the majority of the Supreme Court of the Irish Free State. It was contended by the Chief Justice that the legislation of the State should not be interpreted as permitting a man to be punished by the Constitution (Special Powers) Tribunal on the ground of a statement extorted from him by an officer of the police force, it being made an offence to decline to give such a statement. Though, however, the case was plainly a hard one, it was plain, as Fitzgibbon, J., insisted, that it was governed by the clear terms of the Statute, the Constitution (Amendment No. 17) Act, 1931, and it has been held in respect of Quebec that a statement made to a Fire Marshal in an enquiry by law may be used to found a charge upon,<sup>2</sup> as in England a criminal charge may be brought in respect of answers compulsory under the Bankruptcy Act.<sup>3</sup> Natural justice has equally in vain been pleaded against Irish legislation, the courts holding consistently that they are bound by the terms of Acts, whether they approve them or not.<sup>4</sup>

The Canadian courts have also had to deal with delicate

<sup>1</sup> [1936] I.R. 485; Keith, *Journ. Comp. Leg.* xix, 110, 111.

<sup>2</sup> *R. v. Coote*, 12 Cox, C.C. 557.

<sup>3</sup> *R. v. Scott* (1856), Dears. and B. 47.

<sup>4</sup> See Lord Moulton, *Local Government Board v. Arlidge*, [1915] A.C. 120, 150; Willes, J.J., *Abel v. Lee*, L.R. 6 C.P. 365, 371. Contrast Kennedy, C.J., in *The State (Ryan) v. Lennon*, [1935] I.R. 170, 204, 205.

issues affecting the control of the executive in matters of immigration and deportation of alleged aliens. They have declined to allow the executive to assert final power to determine cases in which it has been claimed that aliens are really British subjects, and they have intervened to secure regularity of process when possible, but not with complete success as regards invasion of rights by high-handed action.<sup>1</sup>

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(vi) In addition to the legislation of the Parliaments, as in England, there is much legislative activity by the executive under delegated powers. There has not perhaps developed so strong a feeling against that form of action as has been displayed in the United Kingdom, but there are many occasions in which it is necessary for the courts to interpret exercises of delegated authority and to limit action. In the United Kingdom this issue has been in part evaded by enacting that rules shall be read as part of the Act under which they are made, a provision which exempts them from examination by the courts beyond the fact that the rules must actually fall within the ambit of the powers given by the Act.<sup>2</sup> This method has not been adopted normally in the Dominions. But the courts there are ready to admit the validity of delegated powers where clearly within the terms of the authority conferred. In *Baxter v. Ah Way*<sup>3</sup> the issue arose whether the Governor-General in Council could validly issue a proclamation under the Customs Act, 1901, prohibiting the importation of opium in a condition fit for smoking. The High Court<sup>4</sup> accepted the

<sup>1</sup> *R. v. Jung Suey Mee* (1932), 46 B.C.R. 533; *Re Yee Foo* (1925), 44 Can. C.C. 17; *Samejina v. R.* (1932), 58 Can. C.C. 300; *Wade v. Egan* (1935), 84 Can. C.C. 21; *R. v. Coleman*, [1935] 4 D.L.R. 444.

<sup>2</sup> Parl. Paper, Cmd. 4060 (1932). For the limits of this action, see *The King v. National Fish Co. Ltd.*, [1931] Ex. C.R. 75; *Literary Recreations Ltd. v. Sauve*, [1932] 4 D.L.R. 553.

<sup>3</sup> (1909), 8 C.L.R. 626.

<sup>4</sup> It negatived the claim that Section 1 of the constitution gave sole legislative power to the Parliament.

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delegation as just, for the Act is not restricted in terms so as to make operative the rule of limitation to articles *eiusdem generis*, which was fatal to the attempt in England to use a general power under the Customs legislation to exclude any articles thought suitable for exclusion by the ministry.<sup>1</sup> Similarly the delegation to the Governor-General of power to determine by proclamation the issue of trading with the enemy has been held valid.<sup>2</sup> On the other hand, the Exchequer Court of Canada<sup>3</sup> has ruled that it is illegal for the Minister of Fisheries in Canada to lay down as a condition for a licence to use an otter trawl under the Act of 1929 that the vessel must be built in the Dominion, for the Act specifies merely that the vessels must be registered in Canada, and owned by Canadians or Canadian companies. During the war period, of course, the power of delegated legislation was used very widely in the Dominions, as in the United Kingdom, and no doubt the courts accepted as valid much that would not otherwise be permissible. Thus the Commonwealth<sup>4</sup> was held not merely as a matter of defence able to pass a measure in wide terms allowing exercise of the power to make War Precautions Regulations, but the action of the Governor-General in fixing prices for commodities was upheld. So in Canada it was ruled that an Order in Council under the War Measures Act, 1914, properly authorised a procedure to secure the fixing by Government authority of the cost of news-print paper supplied to publishers.<sup>5</sup>

<sup>1</sup> *A.-G. v. Brown*, [1920] 1 K.B. 773; [1921] 3 K.B. 29.

<sup>2</sup> *Welsbach Light Co. v. Commonwealth* (1916), 22 C.L.R. 268.

<sup>3</sup> *R. v. National Fish Co. Ltd.*, [1931] Ex. C.R. 75.

<sup>4</sup> *Farey v. Burwett* (1916), 21 C.L.R. 433.

<sup>5</sup> *Fort Frances Power and Pulp Co. v. Manitoba Free Press*, [1923] A.C. 695.

For an invalid Ordinance as to capital territory of Australia, see *Federal Capital Commission v. Laristan Building, etc., Co.* (1929), 42 C.L.R. 582. A general

The issue arose in an interesting form in the case of *Nelson v. Brasby*,<sup>1</sup> for there the point raised was whether the Parliament of New Zealand, which derived its powers to act from an Imperial Order of March 11, 1920, under the Foreign Jurisdiction Act, 1890, could delegate power to legislate as to western Samoa to the Governor-General in Council. It was held that the general rule applied, and that there was full authority to delegate. It was further considered whether the authority given to the Governor-General authorised him to permit the Administrator of Samoa to declare certain associations of native Samoans seditious, so that it became an offence to further their activities. This was held to be much less than a delegation to the Administrator of legislative power, and quite within the province of the Governor-General.

In the case of the Commonwealth the issue is complicated by the question of the separation of powers, which has been invoked to plead that it is impossible to allow the executive to legislate by delegated authority. But this argument was ruled invalid in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. v. Dignan*.<sup>2</sup> It was pointed out that there could not be in the Australian constitution the same amount of rigidity that might be found in the United States. While judicial functions could only be exercised by judges, many functions closely akin could be given to executive officers, e.g. as regards income tax,<sup>3</sup> and the courts can exercise arbitral functions,<sup>4</sup> not strictly judicial, as well as make rules of court, a quasi-legislative function. It was

power under a mining law does not validate a colour bar against native skilled workers. *R. v. Hildick Smith*, [1924] T.P.D. 69. See also *Grech v. Bird* (1936), 56 C.L.R. 228.

<sup>1</sup> [1934] N Z L R. 559.

<sup>2</sup> (1931), 46 C.L.R. 73.

<sup>3</sup> *Shell Co. of Australia Ltd. v. Federal Commr. of Taxes*, [1931] A.C. 275.

<sup>4</sup> *Alexander's Case* (1918), 25 C.L.R. 434.

Chapter X. recognised that it was difficult to draw a line to say where delegation ceased to be valid and passed over into an effort to confer legislative power of an independent character. But it was stressed that, if power were given to a responsible ministry, that might support the view that it was duly delegated, and, the narrower and more specific the power, the more likely it would be to be valid. Hence power of a very wide character to regulate employment of workers was recognised, and so also in *Huddart Parker Ltd. v. The Commonwealth*.<sup>1</sup> There are clearly many difficulties in theory at least, as regards the validity of such legislation, but in practice the courts are generous. But within limits only; fundamental restrictions as regards the use of yeast must not be imposed under the plea of the general power of the Licensing Act, 1928.<sup>2</sup>

How far, apart from express constitutional authority, such as is given in Australia by Section 51 (xxxvii.) of the constitution, one Parliament may concede legislative power to another is doubtful, and has been denied in *R. v. Zaslavsky*,<sup>3</sup> and left open by the Privy Council in *Lord's Day Alliance of Canada v. Attorney-General for Manitoba*.<sup>4</sup>

(3) The control of the Parliaments over finance rests essentially, as has been seen, in the lower houses, for the upper chambers, despite the fact that they have in general wider powers than the House of Lords, nevertheless as a rule exercise them with moderation and restraint. It was felt on all sides in 1913 that the refusal of the Canadian Senate to homologate the policy of granting 35 million dollars to strengthen the British navy was an action rather

<sup>1</sup> (1931), 44 C.L.R. 492.

<sup>2</sup> *Natal Organic Industries v. Union Govt.*, [1935] N.P.D. 701; *Sam Greenberg v. Union Yeast Products Ltd.* (1936), 5 S.A.L.T. 183.

<sup>3</sup> [1935] 2 W.W.R. 34.

<sup>4</sup> [1925] A.C. 384.

of partisan bitterness than of justifiable caution in the use of public funds.

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In form the lower house has the fullest control of supply; it decides the expenditure to be incurred, and the means by which it is to be made good. The procedure follows the established British precedents in principle. The house resolves itself into Committees of Supply and of Ways and Means on the British model. Moreover, the British conventional rule, which rests at Westminster on resolutions of the Commons, that no money measure can be considered save on the recommendation of the Crown, is formally enacted as law in the Dominion constitutions, as is the principle of the annual session of Parliament. The smaller size of the Dominion Parliaments, and the less complex character of the operations which they control, enable the members to exercise a more intelligent criticism over the estimates, but it must not be assumed that this is necessarily a wholly good thing. In fact the pressure of electors on members and that of members on the Government are continuously exerted to enforce expenditures of unwise and wasteful character on various forms of public works, especially when an election is near. A Canadian member has been able to assure his electorate at a bye-election that there is a schedule of what will be done for the district if he is returned, and that, if he is not, nothing will be expended; and the application of money for roads was long a decisive factor in securing popularity and re-election in Newfoundland. Some efforts have had to be made to counter this evil; thus in the Commonwealth and in New South Wales, as has been seen, the fact that the upper house must be consulted has led to the evolution of the system of setting up Committees on which both houses have representation, to which all proposals for public works exceeding £25,000 or £20,000

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must be referred, so that the projects may be examined dispassionately and carefully with full investigation of the estimates submitted by the departmental chiefs and experts.<sup>1</sup> In the Union the plan is adopted<sup>2</sup> of establishing a separate and self-contained financial system for the Railways, Ports, and Harbours with the intention that they should be managed on business lines. The theory is that these public utilities should be so controlled as to bring in returns to meet the expenses of operation and interest and sinking fund on debt. New construction of railways cannot be provided for blindly by Parliament, for the administration must lay before it an estimate of the deficit on working, if any, which may be expected, and this must be made good from the Consolidated Revenue Fund as distinct from the Railways and Harbours Fund, and Parliament must make good to that fund any services which it requires it to undertake gratuitously or under cost. But though Parliament thus cannot be blind to consequences, that does not mean that it need refrain from action, and in fact, as the Auditor-General pointed out in 1925, the new policy of the employment at high wages of unskilled white labour in lieu of natives contradicts the purpose of the constitution that railways and harbours shall be managed on business principles. The answer, of course, is that national well-being must take precedence of mere economy when the two clash.

Just as it is difficult for Governments to control expenditure, as New Zealand found when it had to adopt the most drastic of Parliamentary methods to force through economy in 1931-2, so it is difficult to secure revenue, for taxation is as unpopular in the Dominions as in the United Kingdom. But this is to some extent countered by the fondness for

<sup>1</sup> See p. 302, *ante*. For Victoria see Act No. 4288 (1935).

<sup>2</sup> South Africa Act, 1909, ss. 125-31.

the use of Customs duties as the mode of securing revenue, for then there will always be an interested group of members who desire, in the interests of manufacturers and employees, to obtain higher protection for some business of importance which it is desired to extend. No doubt an individual group would have little weight, for its selfish ends might be easily denounced, but there are numbers of such groups, whose natural action is to unite to secure tariffs by agreement that each party shall support the others in their application to the Government. The process is carried out in the most complete form in the Commonwealth, where the power of senators to suggest increases of duties proposed by the house results in the duties being finally fixed, in the past, at ever-increasing amounts by agreements arrived at privately between interested members. The moderating influence, of course, in such cases consists in the fact that, while the representatives of primary producers dislike increases, they have the assistance of members interested in such secondary industries as require fairly cheap raw or semi-manufactured material as a basis for their output.<sup>1</sup> Not less important is the pressure of manufacturers in Canada, where they have succeeded since 1879 in forcing up duties steadily, aided no doubt by the similar action taken in the United States. New Zealand has had exactly the same experience, and the Union of South Africa has more recently developed the policy of fostering secondary industries, a plan declared vital to the Free State by Mr. Cosgrave's ministry, but even more energetically pressed by Mr. De Valera.<sup>2</sup>

Obviously to meet these conditions some serious consideration of tariff changes is essential if there is not to be

<sup>1</sup> In 1936 there was a partial breach of Australia's obligation under the Ottawa Agreement of 1932; *J.P.E.*, 1936, pp. 548 ff.; cf. 1937, pp. 100 ff.

<sup>2</sup> Control of Imports Act, 1934; Control of Manufactures Acts, 1932 and 1934; Tobacco Act, 1934, etc.

Chapter X.—chaos. Hence in the Commonwealth a Tariff Board Act of 1921-9 secures that all proposals for new rates, or for bounties, or the application of the British preferential tariff to other Dominions or of the intermediate tariff to foreign countries, which normally are exposed to the general tariff, and complaints against undue charges by manufacturers under protection, shall be dealt with by a Board, now of four members, whose advice is made available to Parliament, while by requiring that enquiries shall be held in public and evidence given on oath the electorate is afforded means of realising the effect of tariff changes. The Board also makes enquiries on which may be based the imposition of anti-dumping duties, a policy followed in all the Dominions. In Canada, from 1926, an Advisory Board on Tariff and Taxation was set up under the Supply Act by Mr. Mackenzie King. In 1931 its members were deprived of their functions by Mr. Bennett, and in lieu an Act was passed to establish a Tariff Board whose three members were to hold office for ten years and were not eligible for election to the Commons for two years thereafter. The Liberals claimed that tenure should be at pleasure, as the Board should be in harmony with the Government of the day; but this was rejected, as well as the proposal that all requests for tariff increases must be referred to it, and that it should investigate the capitalisation, salaries and wages, and hours of labour of companies applying for increased rates of duty. The Board was given the duty of recommending the rates to be levied to equate costs of production as between Canadian and imported goods, and it served an important part in maintaining the excessive height of Canadian imposts on imports from the United Kingdom.<sup>1</sup>

<sup>1</sup> In 1935 the members were constituted the Trade and Industry Commission under that Act (25 & 26 Geo. V., c. 59).

Since 1935 the Liberal Government has aimed at lower tariffs.<sup>1</sup> The Irish Free State, by the Tariff Commission Act, 1926, established an excellent system. The Commission has three members who are nominated by the Ministers of Finance, Agriculture, and Industry; each holds office for two years but may be re-elected. They have the powers of a court as to securing evidence and examining witnesses on oath. To the Commission is referred any application for increase or change or abolition of tariffs, and the report of the Commission is accorded the greatest weight by the Government and Parliament.

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Control over the use of the funds approved by Parliament is ensured by the adoption of a system similar to the British.<sup>2</sup> Thus in the Commonwealth the duty of the Treasury is to prepare estimates of requirements, submit them to the Auditor-General, who, if satisfied, certifies that appropriation has been made, and the Governor-General then signs a warrant authorising the Treasury to issue cheques on the public account in the Commonwealth Bank, into which receipts are paid. The Auditor-General<sup>3</sup> is an official independent of the Government, who can be removed only on addresses from the two houses. As in the United Kingdom, it is his business to scrutinise the expenditure carried out through the Treasury department. He must satisfy himself that expenditure is duly vouched, that it is charged to the proper heads of the estimates, and that it is duly authorised. So also he supervises the correctness of the collection and accounting for revenue, trading accounts, and stores. He has the right to surcharge, but the Governor-General in Council may remit. A reasonable discretion in

<sup>1</sup> Agreements were made with the United States, Nov. 15, 1935 (*J.P.E.*, 1935, pp. 277 ff.), and the United Kingdom, Feb. 23, 1937 (Cmnd. 5382).

<sup>2</sup> Even in the Irish Free State and in Constitution of Éire, Arts. 17 and 28.

<sup>3</sup> For Éire's Comptroller and Auditor-General see Art. 33.

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charging excess expenditure against other subdivisions in the estimates is given to the Treasurer. Parliament, by means of a Public Accounts Committee, examines the accounts in the light of the advice of the Auditor-General, but it may be feared that, as in the United Kingdom, these *ex post facto* inquests are of minor importance as encouraging economy, and that the most important work is that of the Auditor-General, whose function, however, is after all one of securing correctness of account and due authority, but not of criticising financial methods, still less objects.

All expenditure, of course, cannot be foreseen, and it may be that sums must be paid before an Act is passed. The Governor-General then issues a special warrant, and on occasion enormous sums are thus spent, as in Canada in 1926 when the grant of a dissolution to Mr. Meighen without supply having been passed rendered it imperative to expend millions on warrants only.<sup>1</sup> The practice is far from rare, but in some cases it has been mitigated by legislation which permits expenditure either of sums up to a fixed amount or sums based on the expenditure authorised for the previous year pending Parliamentary sanction. Such warrants, of course, diminish the power of the upper house, for money spent cannot well be refused sanction, nor could it *de facto* be recovered in the majority of cases. The Governor-General's position in these matters is governed by the consideration that he cannot, unless in a very flagrant case of illegality, refuse to accept the assurance of ministers that funds must be provided to carry on the administration. Of course, if a Government like that of Mr. Lang in New South Wales were indifferent of law, and sought to govern for any length of time without the support of Parliament, refusal to issue warrants would bring its

<sup>1</sup> See Mr. Mackenzie King's denunciation, June 30, 1926.

activities to an end. Though this mode of expending money by special warrant is available, it must not be supposed that the necessity of the sanction of Parliament can in law be evaded. It has been made clear by the Privy Council<sup>1</sup> that money expended without due sanction can be recovered from the recipient, that a Government has no right to pay out money without a clear legal duty to do so, and that a Government cannot force the hands of Parliament by making a contract and then allowing judgment of a petition of right to be awarded against it, so that the administration becomes indebted to the person concerned.<sup>2</sup> Even in such a case the funds to pay the debt must be appropriated by Parliament. It is not legal to pay off such claims from funds actually in the Treasury; the judgment implies a moral duty on the ministry to secure the approval of Parliament, but Parliament is not bound to implement an obligation undertaken by a ministry which is dishonest, and those who contract with ministers must bear in mind that they do so subject to the necessary condition that they cannot secure payment unless and until the legislature provides the funds.<sup>3</sup> No doubt ministers may act and obtain an appropriation later on, for it seems a very dubious suggestion of the High Court of the Commonwealth that a commitment by the executive not previously authorised by the Parliament cannot be put right by a subsequent appropriation.<sup>4</sup>

The Dominions have encountered the same difficulties as in the United Kingdom in respect of the rule of the lapse of appropriations not expended by the close of the financial year, the date of which does not normally agree with the

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<sup>1</sup> *Auckland Harbour Board v. R.*, [1924] A.C. 318

<sup>2</sup> *Alcock v. Fergie* (1867), 4 W.W. & A'B 285 (Victoria)

<sup>3</sup> *Commonwealth v. Colonial Combing, etc., Co* (1922), 31 C.L.R. 421

<sup>4</sup> *Commonwealth v. Colonial Ammunition Co* (1924), 34 C.L.R. 198. A wide view is taken in *New South Wales v. Bardolph* (1934), 52 C.L.R. 455.

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British. Hence the Commonwealth has set up, in addition to the Consolidated Revenue Fund, which is the normal fund to receive revenue and to provide for expenditure, a Loans Fund and a Trusts Fund into which may be paid unexpended balances of grants or sums which are to be spent over several years, and the plan has been also followed less systematically elsewhere. Its legality was duly contested in the Australian courts, but without success.<sup>1</sup>

The sources of revenue differ little from those normally adopted by administrations, British and foreign. Greater importance attaches to Customs duties and excise; the war compelled a wide use of income tax and of death duties; land taxation is of much importance, and entertainments yield considerable sums, while excess profits are usually taxed. Licences, stamp duties, and, in the Union, native taxes of various kinds, are levied. From public services are realised considerable sums, especially from postal services and railways, though these may now result in a deficit. Rents of Government property, especially mining property, are an important item in the Union, and there are fines and forfeitures. Interest on advances from the Government to settlers is of consequence in Australia in particular. Expenditure includes a heavy burden of interest on loans, and is increased by the wide activities of Governments in providing such benefits as old-age pensions, and in public works of all kinds including railway and harbour development on a generous scale.

(4) Procedure follows closely the British model; in special, the rule of three readings of Bills with committee and report stages is imitated more or less closely, and the standing orders follow in principle the rules of the House of Commons; even in the Irish Free State the divergences are

<sup>1</sup> *State of New South Wales v. Commonwealth* (1908), 7 C.L.R. 179.

not fundamental, and, while the speech from the throne has been abandoned, some substitute has been attempted in a declaration of ministerial policy. The formal ceremonial, which is an inheritance from the earliest days in Canada, has not been relaxed, rather it has been preserved and developed in the laudable desire to impress on legislators and the public alike the serious character of their functions.

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The Governor-General or Governor has the right to summon, prorogue, and dissolve Parliament under the Constitution Acts, though the letters patent even of Canada in 1931 still give the power as if *de novo*. In such action he must be governed by ministerial advice; if he feels that a dissolution is essential, as in New South Wales in 1932, he must dismiss the ministry before he acts, so that he can have a new ministry to advise him. The Premier may advise<sup>1</sup> and the Governor act, even against the wishes of the Cabinet, as in the same State in 1927; but the form adopted is to secure by the resignation of the Premier and his reappointment a Cabinet to advise. There too in 1911, when the Assembly refused to adjourn, he had to prorogue, because he could find no ministry able to relieve his advisers of their task. His power to dissolve was dependent in the Irish Free State on the Executive Council possessing the confidence of the Dáil; in that case he had no discretion, but the Constitution of Éire restores the normal discretion. He is bound also in law by the rule of annual sessions; where, as in the Cape during the Boer war, this is violated, his action must *ex post facto* be validated by Act, as there in 1902. But, though Parliament must meet, it need not be allowed to do any

<sup>1</sup> The primary right of the Prime Minister was asserted in an Order in Council, July 19, 1920; Dawson, *Const. Issues in Canada, 1900-1931*, p. 125, see Keith, *The King, the Constitution, the Empire, and Foreign Affairs, 1936-1937*, pp. 41, 42.

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business, though this is normally impracticable in view of the need of supply. After a dubious general election, as in Canada in 1925, an early meeting of the legislature is clearly constitutional, and Mr. Mackenzie King so advised.<sup>1</sup>

In the Commonwealth, Victoria, South Australia, Tasmania, and New Zealand, the Governor may return a Bill to Parliament with suggestions, this action is done on ministerial advice in order to remedy oversights. The Union has the same rule.

The Speaker of the lower house is elected by its members; in New Zealand the appointment requires confirmation by the Governor-General. The President or Speaker of the upper chamber is appointed by the Governor-General, where the house is nominated, but in New Zealand elected subject to his confirmation, in the elective houses he is elected, in Victoria subject to confirmation by the Governor. Under an Act of 1927 the Chairman of the Dáil was exempted from the necessity of re-election as a member to that body, but in 1932 Mr. De Valera's party refused to agree to following the British principle of re-election as Chairman. It has been rejected in Canada and the Union on principle. The Speaker, however, in office is expected to be impartial, but he is entitled to vote on party grounds, and frequently in the small houses of the Dominions and close party divisions his vote has been decisive. Normally the presiding officer of both houses votes only to break a tie, but in Canada and Quebec and in the Commonwealth the president of the upper house has an ordinary vote; if the votes are equal, the result is to negative the proposal under debate.

Ministers may speak in either house in the Union and, under the constitution of 1922, in the Irish Free State, but, though the concession has been mooted in Canada, it has

<sup>1</sup> Dawson, *Const. Issues in Canada, 1900-1931*, pp. 129, 130.

not been conceded. In the Free State it was freely and very usefully employed by Mr. Cosgrave and Mr. De Valera alike, and is continued in the Constitution of Eire.

All members before they take their seats must swear an oath of allegiance<sup>1</sup> or make an equivalent declaration. The Irish Free State oath was unique in being one of true faith and allegiance to the Irish Free State constitution and also to the King and his successors in virtue of the common citizenship of Ireland and Great Britain and her adherence to and membership of the British Commonwealth of Nations. Needless to say, allegiance does not depend in the least on the oath, and its value as a preventive of republican sentiments and aims is shown by the fact that Mr. Tielman Roos and Mr. De Valera have both consented to swear allegiance. It is not surprising that Irish opinion discounts its value completely, and, had the issue been approached more tactfully by Mr. De Valera, the conflict of 1932 need never have occurred. The validity of its abolition in 1933 has been affirmed by the Privy Council.<sup>2</sup>

Debate has gradually had to be closed with more frequency than in earlier times. Sir W. Laurier dissolved in 1911 rather than use the closure to force the Bill to accept the reciprocity agreement with the United States through the Commons, but in 1913 Mr. Borden carried his Naval Aid Bill by this means,<sup>3</sup> and in 1926 it was adopted to terminate on March 2 the debate on the reply to the address from the throne which began on January 11. In 1923 and 1925 the Commonwealth had to legislate under stringent urgency conditions, involving the free use of the guillotine, and in 1931 New Zealand had to resort to most drastic

<sup>1</sup> The Canada Oaths of Allegiance Amendment Act, 1934, leaves untouched necessarily the form in the British North America Act, 1867.

<sup>2</sup> *Moore v A.-G. for Irish Free State*, [1935] A.C. 484

<sup>3</sup> Dawson, *Const. Issues in Canada, 1900-1931*, pp. 217-22.

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restrictions to pass her economic legislation. For ordinary purposes time limits have generally been adopted. In Canada in 1927 the rules were revised to give members no more than forty minutes, save for the Prime Minister and the Leader of the Opposition; the mover of the order of the day and the member in reply; the mover of a vote of no confidence and the member in reply. The rules can usually be waived, and they do not prevent much repetition and vague generalities of argument, nor is the standard of debate high.

The drafting of governmental Bills is provided for by the appointment of professional draftsmen, but private persons are, as in the United Kingdom, compelled as a rule to rely on their own resources. In the Commonwealth, New South Wales, and South Australia a Bill may, by the consent of the house in which it originated, be taken up by the other, or it may be continued in the house of origin if it has not yet passed all its stages in the previous session. This excludes the case where there has been an election of the upper chamber in the interim.

Private Bills are, as in the United Kingdom, carefully distinguished from public Bills; they are defined to include local no less than personal measures, and they are subjected to consideration by committees which take evidence for and against, and can award costs to or against the promoters and opposers of the measure. Due provision is made for notice to parties interested, and the right of opposition is accorded to those who can properly be held to be directly affected and not merely as members of the public. As in the British Parliament, this procedure is of high value in protecting public interests and saving public time.

In disputes between the houses the use of conferences between representatives is not rare in the Commonwealth,

the States, and the Union. It has been less used in Canada, but it was employed in 1928 over the question of old-age pensions, not without utility. The principle was recognised in the Irish Free State constitution of 1922.

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The mode of enacting Acts is formally expressed to be by the King<sup>1</sup> with the advice and consent of the two houses, though the Commonwealth omits "advice and consent" as needless. In Newfoundland, New Brunswick, Nova Scotia, Prince Edward Island, South Australia, and Tasmania the Governor takes the place of the King; in New Zealand the General Assembly, which includes the Governor-General, enacts. But in all cases the effect is the same. Assent may be given in person, or by commission, or at the Government offices; in most cases the Acts are signed by the representative of the Crown. In Canada and the Union the Governor-General is not bound to sign the English rather than the French or Dutch or Afrikaans version.<sup>2</sup> In this case the signed copy decides which version prevails if there be discrepancy, there is no rule in Canada, but in Quebec it has been laid down that harmony with the context and, in the case of a consolidation, the language of the original can be taken into consideration.<sup>3</sup> In the Irish Free State the Governor-General might and the President of Eire may<sup>4</sup> sign either version, but in fact the Irish rendering is made from the English original, as the members

<sup>1</sup> Not since Dec. 12, 1936, in the Irish Free State, nor under the Constitution of Eire; the President will then sign no doubt the version in which the Bill has been enacted and it will prevail, Art. 25 (4).

<sup>2</sup> The original idea was that he would as speaking English sign the Bills in that version. Now he often signs those in Afrikaans, including no doubt deliberately the Union Nationality and Flags Bill, for the Union puts "Uniestaatsburger" above "Britse onderdaan". (*B.Y.I.L.* xvii. 188 f.).

<sup>3</sup> In 1927 a Bill was introduced to give the French version priority this would be patently illegal. For restriction of a wide English term "public work" by the French see *R v Dubois*, [1935] S.C.R. 378.

<sup>4</sup> Art. 25 (4). It is then decisive. Each measure must be translated.

Chapter X. of the Parliament are not yet as a rule competent to debate  
in the neo-Irish speech.

(5) The privileges of Parliament have played a considerable part in Dominion political and legal history. Save in the Commonwealth, it is normal for the Speaker still to ask for them as in the British Parliament. But there is the essential difference that in the United Kingdom they rest on the *lex et consuetudo Parlamenti*, whereas in the Dominions they depend on express enactment. The early view in Canada no doubt claimed that the legislatures were in the same position as the House of Commons and the House of Lords, and they sought to impeach offenders by the British procedure. But the Privy Council has definitely negated any such claim, and, if a legislature has not legal provision for privileges, it will find itself treated as having only powers to preserve decorum and good order,<sup>1</sup> forbidden to commit officials for refusing to appear before it,<sup>2</sup> or punish its own members by commitment for insulting behaviour, though for disorderly conduct before it it might exclude or even expel.<sup>3</sup> Needless to say, in the great majority of cases—New South Wales being the chief exception—early steps were taken to secure by law the same privileges as the House of Commons. This determination was long opposed in Canada by the federal Government, which denied to the legislatures the power to treat themselves as analogues of the Dominion Parliament. But in *Fielding v. Thomas*<sup>4</sup> the Privy Council definitely admitted the power of the legislature to

<sup>1</sup> *Doyle v. Falconer* (1866), L.R. 1 P.C. 328; *Willis v. Perry* (1912), 43 C.L.R. 592; *Barton v. Taylor* (1886), 11 App. Cas. 197, *Harnett v. Crick*, [1908], A.C. 470.

<sup>2</sup> *Kelley v. Carson* (1842), 4 Moo. P.C. 63, *Fenton v. Hampton* (1858), 11 Moo. P.C. 347.

<sup>3</sup> *Doyle v. Falconer*, definitely admits this *obiter*, 4 Moo. P.C. (N.S.) 219.

<sup>4</sup> [1896] A.C. 600; *Payson v. Hubert* (1904), 34 S.C.R. 400.

legislate for the right to summon witnesses and punish for contempt. The authority lies on the right of the provinces under Section 92 of the British North America Act, 1867, to alter their constitutions if they think fit. As regards Australia, it has been laid down<sup>1</sup> that Victoria can commit for contempt in the form of a libel, and that, if the Assembly does not express the ground of contempt, it is not open to the judiciary to investigate the issue, a view in harmony with English doctrine.

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It is the practice in the constitutions or the Acts conferring privileges to assimilate them to those of the House of Commons for the time being, and no effort is made to treat the upper chambers to the wider rights of the Lords. But by the constitutions of Victoria and South Australia as well as of Canada, the houses were limited to the then existing privileges of the Commons. That was altered in 1875 for the Dominion by Imperial Act, so that the Dominion must now be content with the measure of privilege claimed by the Commons from time to time, as it cannot alter an Imperial Act on the constitution. The States, however, have power freely to extend their powers even beyond the British model, nor is it incumbent on the Union,<sup>2</sup> the Commonwealth,<sup>3</sup> or the provinces to restrict their powers by the model of the Commons. Still less is the Irish Free State concerned with that precedent.

Apart from general legislation it is possible to deal by a special Act with any special violation of the honour of members. This was established in 1922-3 in Quebec when a publication was made reflecting on the conduct of two

<sup>1</sup> *Speaker of the Legislative Assembly v. Glass* (1871), L.R. 3 P.C. 560. Cf. *The Case of the Sheriff of Middlesex* (1840), 11 A. & E. 273.

<sup>2</sup> Powers and Privileges of Parliament Act, 1911 (No. 19).

<sup>3</sup> For Parliamentary Papers, see Act No. 64 of 1935.

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unnamed members of the legislature in connection with the failure of the police to discover the perpetrators of a murder. The person responsible, Mr. J. H. Roberts, was ordered to be imprisoned for a year, and the courts refused to intervene, nor was he released until he had given satisfaction to the Assembly. The Dominion Government, though applied to, refused to disallow the Act, doubtless because it fell within the power of the province.

The privileges which are claimed in the Irish Free State are those normal. Members are exempt from arrest<sup>1</sup> save for treason, felony, or breach of the peace while going to, or returning from, Parliament, or in its precincts. They cannot be made liable outside the house for their spoken words. Parliamentary debates are privileged, as are publications authorised by the houses.<sup>2</sup> Each house can by standing orders provide for the maintenance of freedom of debate, for securing the safety of its official documents and the private papers of members, and for ensuring itself against attempts to molest, interfere with, or corrupt members. While little use has been made of this authority in the Free State, in other cases detailed rules have been enacted. In the Union the power to fine, which is obsolete in the United Kingdom as regards the Commons, is taken, which is much more to the point than the system of commitment to the end of the session, as in the United Kingdom. In most cases, as in New Zealand in 1931, it proves that an admonition

<sup>1</sup> Arrest is possible if there is no legislative protection; see *Norton v. Crick*, 15 N.S.W. L.R. 172. The Constitution of Éire (Art. 15 (10), (12), (13)) contains like provisions.

<sup>2</sup> Legislation to protect papers is regular: that it is not effective outside the Dominion appears from *Isaacs and Sons v. Cook*, [1925] 2 K.B. 391 (alleged libel in report to Commonwealth Government by High Commissioner in London may be published in England through circulation in Australian newspapers available at High Commissioner's Office). The effect of the extra-territorial power given by the Statute of Westminster, 1931, s. 3, is uncertain.

administered by the Speaker<sup>1</sup> after consideration by a Committee would be the utmost penalty possible for an attack on the action of members, and that it is often better to leave such matters to the operation of public opinion.

Dominion history is not unfurnished with instances of the violation by the public of the sanctity of the Parliamentary buildings, though nothing has equalled the events at Montreal when Lord Elgin's most significant vindication of the rule of responsible government was signalled by the burning of the chamber. But in 1932 mob violence in St. John's forced the Premier to leave both the houses of Parliament and the capital until order was restored, and, in part owing to the arrival of H.M.S. *Dragon*, business could be resumed by the Government.

An interesting issue has been raised and decided in the Commonwealth Is it competent for a bankruptcy court to make orders regarding the salary of a member of Parliament? In the Commonwealth as usual the issue was complicated by the fact that, the member of Parliament in question being a member of a State Parliament, there was the issue whether a Commonwealth Act could interfere with his execution of his duties towards his constituents and the State It was, however, ruled that in principle there could be no exemption from the control of the court, the court having discretion to limit its order in such a way as it might hold proper.<sup>2</sup>

<sup>1</sup> For Speaker Peel's famous admonition to railway directors for an offence in connection with evidence given before a Parliamentary Committee (1892), see A. Chamberlain, *Down the Years*, pp. 70 f.

<sup>2</sup> *Stuart-Robertson v. Lloyd* (1932), 47 C.L.R. 482.

## CHAPTER XI

### THE JUDICIARY

**Chapter XI.** It is a fundamental principle in every Dominion that the judiciary should be enabled, by reason of security of tenure, to exercise fearlessly its functions. The essential function of the judges is to interpret the statute law of the territory and to expound—incidentally no doubt to extend—its common law, English in the Dominions in general, but French in Quebec, and Roman Dutch in an attenuated and sublimated form in the Union of South Africa. True to English conceptions, there is normally no provision in Dominion constitutions to define the nature of judicial power, but there is an exception in the case of the Commonwealth of Australia, where a faint reflection is found of the American doctrine of the separation of powers.

(1) The rule of judicial tenure is in principle good behaviour, with, as a mode of removal, representations from the two houses of the legislature to the Crown or to its representative in the territory. Thus in Canada judges of the superior courts may be removed by the Governor-General on addresses from the two houses under the British North America Act, 1867, s. 99. There is no age limit, so that resignation on incapacity has been enforced by the ingenious device of providing by Act for the cessation of salary on incapacity duly attested. Supreme Court judges by Canadian Act have like tenure, but retire at age seventy-five. In Newfoundland an address from the houses to the

Governor is the prescribed method; in New South Wales, Queensland, and Western Australia an address to the Crown; while in Victoria, South Australia, and Tasmania an address to the Governor is required. The divergence of form may now be deemed to be of no importance, though in Mr. Justice Boothby's case in South Australia in 1862 the British law officers held that the Crown in such a case should be advised by the Privy Council and could not act automatically. It is clear that in these States and in Newfoundland the procedure of Burke's Act,<sup>1</sup> namely, suspension by the Governor in Council followed by removal by the King on the advice of the Privy Council, is legally possible, but it may be dismissed now as obsolete.<sup>2</sup>

The Commonwealth<sup>3</sup> adds to the addresses from the houses the requirement of proved misbehaviour or incapacity, but the Parliament is clearly the only judge, and the Union constitution omits the qualification "proved" as inconvenient. In both cases the final authority is the Governor-General in Council. In New Zealand the Crown can remove on address from the houses, but the Governor-General in Council may suspend on address or provisionally if the legislature be not in session. The Irish Free State provided for removal on resolutions of both houses for stated misbehaviour or incapacity; on the abolition of the Senate a four-sevenths majority of the membership of the Dáil was required. It gives seventy-two as the age of retirement as in New Zealand, and since 1936 Victoria, while Queensland and New South Wales fix age seventy. The Constitution of Éire restores the resolutions of both houses. The Commonwealth cannot compel retirement, for

<sup>1</sup> 22 Geo. III c. 75, *Montagu v. Lieutenant-Governor of Van Diemen's Land* (1849), 6 Moo P C. 489.

<sup>2</sup> In Newfoundland the constitution being suspended, it might be resorted to.

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Chapter salaries may not be diminished during tenure of office, but  
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It is clear that judicial independence is not destroyed by the fact that, though the salary may not normally be reduced while in office, income tax is levied.<sup>1</sup> Nor in time of stress can judges expect to escape reductions of salaries like other Crown servants, as in 1931. But it would be dangerous if the Governor-General in Council, who has the power to appoint, could make valid appointments to the bench without securing Parliamentary salary grants, for such nominees could not be deemed independent. The Privy Council has therefore ruled that the power to appoint officers in the Governor's letters patent does not give the right to add a judge for whom no salary is provided.<sup>2</sup> In Queensland, unfortunately, the importance of security of tenure has been sometimes ignored, and judges have been given only a seven-years tenure, which is clearly legally possible as a tacit amendment of the normal rule.<sup>3</sup> The High Court of the Commonwealth, in an effort to safeguard judicial status, had held that any such appointment, being contrary to the rule of the constitution, should be made by a formal alteration of the constitution and not incidentally.

The Irish Free State constitution, followed by the Constitution of Éire, expressly enacts the maxim of the independence of judges and enforces it by forbidding them to hold other positions of emolument, while, as in the rest of the Dominions, it disqualifies them from sitting in Parlia-

<sup>1</sup> *Judges v. A.-G. for Saskatchewan* (1937), 53 T.L.R. 464, *Cooper v. Commr. of Income Tax, Queensland* (1907), 4 C.L.R. 1304. For reduction in Australia cf. *Austr. Law Journal* x. Suppl. 25.

<sup>2</sup> *Buckley v. Edwards*, [1892] A.C. 387; *Cock v. A.-G.* (1909), 28 N.Z.L.R. 406.

<sup>3</sup> *McCawley v. The King*, [1920] A.C. 691.

ment. In the Dominions as in England they enjoy a wide measure of immunity<sup>1</sup> for judicial actions, whether within or without their powers.

In the Dominions as in England the employment of judges on Royal Commissions has been discussed with some liveliness. The argument against the practice is that a judge may thus be distracted from his true duties, and embarrassed if later he come to be concerned judicially with issues which have been before him as a Commissioner. Objections have also been raised to the use of judges to enquire into matters raised in Parliament;<sup>2</sup> in the famous Pacific scandals of 1873 the proposal to refer the allegations against the Conservative leaders to three judges was denounced by Mr. Huntington as unconstitutional, and judges in difficult and delicate cases of this kind are exposed to the abuse which sometimes is lavished on their activities in the delicate matter of the hearing of electoral petitions, though experience has proved that they deal better with these matters than any other. In Victoria in 1934 (Act No. 4278) a Court of Disputed Returns was at last created on this ground.

The recruitment of judges naturally is made from the local bars, as is in fact provided in certain cases by the British North America Act, 1867, for Canada. There is a tradition that the Attorney-General is specially qualified to be considered for judicial rank when a judicial vacancy occurs, and the fact that entry to the bench can thus be attained no doubt explains the rather inferior quality of some occupants of the State benches, in cases where

<sup>1</sup> *Scott v. Stansfield* (1868), L.R. 3 Exch. 220; *Anderson v. Gorrie*, [1895] 1 Q.B. 668

<sup>2</sup> The advantages of judicial enquiry were conclusively proved in England in 1936 as regards budget disclosures Parl. Pap., Cmd. 5184. For an unsuccessful effort to prevent enquiry by a Royal Commission as usurping a judicial function, see *Timberlands Woodpulp Ltd. v. A.G.*, [1934] N.Z.L.R. 270.

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Labour Attorneys-General have received judicial preferment. In the case of the Commonwealth the most interesting feature of appointments has been the deliberate choice by Labour ministries of men with pronounced Labour views. This step was taken in the appointment of Isaacs and Higgins, JJ., and their attitude differed significantly from that of judges appointed in the United Kingdom, whose conversion from political activity to judicial impartiality is normally rapid. These distinguished men, consistently and with complete disregard for the normal principle that judges conform their views to decisions binding on them, asserted their opinion of the true nature of the constitution as opposed to the consistent jurisprudence of the first three justices, and to them belongs the credit or otherwise of introducing the legislative power in industrial issues now virtually exercised by the Commonwealth Court of Conciliation and Arbitration. Labour again in its tenure of power in 1930 took the remarkable step of securing the appointment of Sir Isaac Isaacs at an advanced age to be Governor-General in face of the strong disapproval of the Opposition, largely no doubt in order to secure a vacancy on the bench for a Labour nominee.<sup>1</sup> The two justices appointed by the Labour ministry have repeatedly indicated the thoroughly Labour character of their legal outlook.<sup>2</sup> It would, of course, be out of place to criticise this mode of action, which is probably inevitable in the case of a federal constitution of which the final interpretation lies in the hands of the local judiciary. But the contrast with the British judicial system is striking and deserves notice.

It is another point of contrast to British modern usage

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 104 ff., 129.

<sup>2</sup> A criticism of many views of Evatt, J., is given by Keith, *Letters on Current Imperial and International Problems, 1935-1936*, pp. 81-90

that attacks of some vehemence are at times delivered against the judges<sup>1</sup> and are punished with what seems unnecessary severity, but here again it is patently difficult to judge of the circumstances locally which may render it essential to curb the licence of the press in attack. In less advanced stages of society it is quite possible that to pass by, without firm restraint, judicial attacks on judicial impartiality might be dangerous to respect for the law.

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An interesting issue is raised by the occasional principle laid down by legislation restricting the investigation of constitutional issues by certain courts. Thus in the draft Constitution of Éire the examination of the validity of legislation was ascribed to the Supreme Court only. Was, then, a criminal court to pronounce sentence under a law which is constitutionally invalid? Must habeas corpus be refused though the law under which arrest may have taken place may be invalid? These are difficult questions.<sup>2</sup> Again, in the Union of South Africa the Magistrates' Courts Act, 1917 (No. 32), forbids (s. 164) a magistrate to pronounce invalid a provincial ordinance, which, of course, is contrary to the normal rule that a court administers law, and that an invalid law is not law at all.<sup>3</sup> Would effect be given to this enactment, or would the court treat it as void, reviving the old doctrine of Coke that a court might hold void that which is against right reason? The answer probably is that the

<sup>1</sup> *R. v. Dunbabbin, Williams, Ex parte* (1935), 53 C.L.R. 434 Any person can call attention to the issue, or the judges act *ex mero motu*. *R. v. Hannington* (1869), Mac (N.Z.), 712, *R. v. Ellis, Baird, Ex parte* (1889), 28 N.B.R. at p. 250. For England see *R. v. Gray*, [1900] 2 Q.B. 36 See also *McLeod v. St. Aubyn*, [1899] A.C. 548, *Ambard v. A.G. for Trinidad*, [1935] A.C. 322.

<sup>2</sup> Hence in the final form the High Court, as in the Irish Free State constitution, was given alone original jurisdiction in cases involving the validity of a law in view of the constitution, with an appeal, which no law can invalidate, to the Supreme Court, Art. 34 (3) and (4).

<sup>3</sup> Cf. Dan Esterhuysen, *S.A. Law Times*, v. 116.

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court must obey, on the ground that the law which is absolute compels it to treat every provincial ordinance as valid for all purposes connected with the court, leaving it possible to obtain otherwise a declaration of the invalidity of the ordinance.

(2) The functions of the superior courts of the Dominions are similar to those of the British courts, and they include the important work of controlling executive governmental authorities, especially in the sphere of local government by the use of the prerogative writs of mandamus,<sup>1</sup> certiorari, and prohibition. The essential power of the High Court of Australia to resort to the use of these writs has been asserted with special reference to attempts to subtract from its control the operations of the Commonwealth Court of Conciliation and Arbitration. But the High Court has held that the legislature cannot take from it the inherent right to investigate whether the circumstances, which have been alleged as the ground of the jurisdiction of that Court being put into operation, are such as to justify that action.<sup>2</sup> No doubt there is some tendency of late years to endeavour to lessen the power of the superior courts to intervene, but the same tendency is well known in the United Kingdom and arises from reasons of equal weight in the Dominions.

The organisation of Dominion courts follows lines similar to those of the English courts, apart from the principle that in general from a superior court there is but one appeal, instead of the appeal first to the Court of Appeal and then

<sup>1</sup> For the possibility of mandamus to a State officer, see *The King v. Registrar of Titles for Victoria* (1915), 20 C.L.R. 379, for use to compel fair treatment by Customs: *R v. Comptroller-Gen of Customs, Woolworths Ltd, Ex parte* (1935), 53 C.L.R. 308, to investigate validity of a by-law, *Bale v. Sorlie*, [1936] Q.S.R. 259.

<sup>2</sup> *The Tramways Case* (No. 1) (1913), 18 C.L.R. 54. For the sphere of certiorari, see *Minister of Health, v. R.; Yaffé, Ex parte*, [1931] A.C. 494. On jurisdictional facts cf. *Ohene Moore v. Tayee*, [1935] A.C. 72.

to the House of Lords in England in civil cases. The appellate court may or may not be formally styled Court of Appeal or Appellate Division, or consist merely of a full bench of the Supreme Court. The Irish Free State, followed by the Constitution of Eire, sets at the head of the judicial system the Supreme Court at first of three judges, now expanded under the Courts of Justice Act, 1936, subordinate to which is the High Court of six or more judges, who sit also in the Central Criminal Court for specially serious offences, while Circuit Courts perform in the circuits much of the business of the High Court, subject to appeal. The policy of decentralising the Supreme Court was also adopted in 1921 by Queensland, when the District Courts were abolished and Supreme Court judges sent to exercise jurisdiction in their place.

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In the Union of South Africa the organisation is based on the old provincial system. There are Provincial Divisions of the Supreme Court with, in addition, two Local Divisions for the Cape, Eastern Districts, and Griqualand West, and for the Transvaal the Witwatersrand Local Division at Johannesburg, with a Native High Court in Natal. Above them all is the Appellate Division at Bloemfontein, with a Chief Justice and four Judges of Appeal.<sup>1</sup>

As in England, the issue has been raised as to the making by the courts of declaratory judgments in matters affecting the Government. The limits of such actions are still far from well defined. In the Irish Free State, however, in *Blythe and Others v. Attorney-General*,<sup>2</sup> it was ruled that the

<sup>1</sup> South Africa Act, 1909, ss. 95, 96, 98; Act No. 12 of 1920. In criminal cases it has no general appellate jurisdiction as regards Superior Courts, deciding only points of law.

<sup>2</sup> [1934] I.R. 266, Keith, *Journ. Comp. Leg.* xvii. 118, 119. It cannot be used in lieu of petition of right, *Royal Trust Co (Cochrane Estate) v A-G for Alberta*, [1936] 2 W.W.R. 337.

Chapter XI. court could entertain an action seeking for a declaration that the League of Youth, an organisation created by the Fine Gael party in opposition to the Government, was a legal organisation such as might be set up under Article 9 of the constitution. The court followed *Dyson v. Attorney-General*<sup>1</sup> and held that jurisdiction existed.

As has been noted above, the courts in the Dominions are often empowered to deal with claims against the Crown either in direct actions or in civil matters under the procedure by petition of right. In such cases much depends on the exact terms of the empowering legislation but something on the general attitude of the court. An alien can bring a petition of right in Canada,<sup>2</sup> but there is no general provision for action in the case of torts,<sup>3</sup> and the compensation which can be claimed from the Government in respect of torts connected with public works has been very carefully limited to matters immediately connected with operations on material buildings. There is no right for compensation in respect of injury done by a driver of a truck for the A.S. Corps on official business,<sup>4</sup> and by reference *inter alia* to the French version of the law the court has negatived any wide interpretation of public work (*chantier public* in lieu of *ouvrage public*).<sup>5</sup> In one case only<sup>6</sup> has Quebec appeared to hold that damages can be obtained for tort. Petition of right is regulated by statute in the federation, in British Columbia, Saskatchewan, Alberta, Manitoba, Quebec, and under rules of procedure in Ontario, but the maritime provinces omit provision. It is widely allowed under statute in Aus-

<sup>1</sup> [1912] 1 Ch. 158.

<sup>2</sup> *Massein v. The King*, [1934] Ex. C.R. 223, 234.

<sup>3</sup> *R. v. Zornes*, [1923] S.C.R. 257.

<sup>4</sup> *R. v. Moscovitz*, [1935] S.C.R. 404.

<sup>5</sup> *Dubois v. R.*, [1934] Ex. C.R. 195; reversed, [1935] S.C.R. 378.

<sup>6</sup> *R. v. Joseph Cliche*, [1935] S.C.R. 561.

tralia,<sup>1</sup> Commonwealth and States, extending in some cases to torts, in New Zealand, and in the Union of South Africa where it is available in certain cases such as the action *de pauperie*, e.g. damage done by a mule to an innocent passer-by, where none would have existed in English law as the mule was not of vicious character.<sup>2</sup> It lies also in the Irish Free State.

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In the federations the courts have to pass judgments on many issues where virtually two units, the federation and a State or province, are in dispute, or States or provinces *inter se*. There arises in Canada one question of importance, the nature of the law to be applied in such contentions, for in the case of Australia<sup>3</sup> it is easier to assume that English common law should govern, whereas in Canada there is the conflict between the civil law of Quebec and the common law. The issue is unsolved.<sup>4</sup>

Though proceedings under the system of petition of right may lie against a Government, it must be noted that the right to grant or refuse a fiat is an executive matter, and that no appeal lies from a refusal.<sup>5</sup> On the other hand, proceedings may be taken, though indirectly they may affect issues on which leave to bring a petition of right has been withheld, even though the judgment in such a case might indirectly put a measure of moral compulsion on the Government concerned.<sup>6</sup>

On the making of declaratory judgments stating in

<sup>1</sup> Const. 75 (iv). Discovery is allowed against the Crown: *Heimann v. The Commonwealth* (1936), 54 C.L.R. 126.

<sup>2</sup> *South African Railways v. Edwards*, [1930] A.D.3.

<sup>3</sup> *R. v. Kidman* (1915), 20 C.L.R. 425.

<sup>4</sup> *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637; see Harrison Moore, *Journ Comp Leg* xvii 191 ff.

<sup>5</sup> *Lovibond v. Governor-General of Canada*, [1930] A.C. 717, cf. *Royal Trust Co (Cochrane Estate) v. A.-G for Alberta*, [1936] 2 W.W.R. 337

<sup>6</sup> *Lovibond v. Grand Trunk Railway of Canada*, [1936] 2 A.E.R. 495.

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theoretic cases the interpretation of validity of legislation there is divergence of view. In Canada such declaratory judgments are regarded as important and desirable,<sup>1</sup> and they are regularly dealt with by the Privy Council, but the High Court of the Commonwealth regards the matter as not within the scope of the judicial power.<sup>2</sup> It may be noted that the power to obtain such judgments has been accorded to the Governor-General under the new Government of India Act, 1935.

(3) It may be added that, as noted above, the common law of the Dominions is English with the important exception of the province of Quebec, which in civil matters retained, after tentative steps to introduce English law as originally promised in 1763-4, French law under the Quebec Act, 1774, and of the Union of South Africa, where the substitution of English law was never seriously undertaken. One result of the fact that the law of the Union is derived from the old Roman-Dutch law, long since superseded in Holland, is that appeals from the Supreme Court to the Privy Council are extremely rare, though in *Pearl Assurance Co. v. Government of the Union of South Africa*<sup>3</sup> the Privy Council insisted on differing from the Appellate Division on the issue of the onus of proof in a case involving the interpretation of an apparent penalty in a contract. The Roman-Dutch law has been applied to South-West Africa

<sup>1</sup> *A.-G. for Ontario v. A.-G. for Canada*, [1912] A.C. 571.

<sup>2</sup> *Judiciary Act, In re* (1921), 29 C.L.R. 257. By s. 102 of Act No. 46 of 1935 the Supreme Court of the Union may make declarations regarding future or contingent rights; but it will not readily do so: *Matsui v. Jansen, N.O.* (1936), 5 S.A.L.T. 193.

<sup>3</sup> [1934] A.C. 570. On Roman-Dutch law see R. W. Lee's *Introduction* (ed. 3, 1931). English influence has been very continuous and persuasive. The authority of the Privy Council on this law still stands high. The system is still in some degree in force in Ceylon, so that decisions of the Privy Council are effective there.

and also to Southern Rhodesia, from which appeal<sup>1</sup> lies to the Appellate Division of the Supreme Court of the Union, and thence only to the Privy Council. The advantage of this procedure is patent.

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With regard to the introduction of English law, a great difficulty has always arisen. The English law introduced, at the date of settlement, or from such date as may be determined by statute in the several cases, includes the common law as judicially expounded, and a great mass of statute law, and much of both could not effectively be applied to the conditions of the colonies. The result is, naturally enough, that the local courts, subject to the control of the Privy Council, have been constantly compelled to judge what parts of English law should be deemed to be in force in any territory.<sup>2</sup> No final doctrine has been attained. There is authority<sup>3</sup> for the view that one must consider the state of the territory at the moment when the English law became applicable. But there is also the view<sup>4</sup> that the decisive time is when the principle in dispute falls to be invoked, and that, if then applicable to local conditions, it should be given effect, without regard to what may have been the condition of affairs when English law was introduced, a question often, it must be remarked, very difficult to solve. Yet a third view<sup>5</sup> suggests that the criterion is whether the English Act in question can from its tenor be regarded as something peculiarly adapted to

<sup>1</sup> Act No. 18 of 1931 (Union); No. 14 of 1931 (Southern Rhodesia). Cf. *Globe and Phoenix Gold Mining Co. v. Rhodesian Corpn. Ltd.*, [1932] A.D. 146.

<sup>2</sup> *Wheeler v. Baldwin* (1934), 52 C.L.R. 609 (Pretended Titles Act, 1540, in force in New South Wales), *Williams v. Lloyd; Williams, In re* (1934), 50 C.L.R. 413 (13 El. c. 5 in force until repealed in 1930); *Hoyles, In re.* [1911] 1 Ch. 179 (Mortmain Act in Ontario).

<sup>3</sup> *Quan Yick v. Hinds* (1905), 2 C.L.R. 345, 356.

<sup>4</sup> *Cooper v. Stewart* (1889), 14 App Cas 286.

<sup>5</sup> *A.-G. v. Stewart*, 2 Mer. 143, 160, *per* Sir W. Grant, M.R.

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XI. English circumstances, or as a general principle. Hence we have conflicting decisions in different jurisdictions as to whether the law of mortmain is part of territorial law or not. Ecclesiastical law is not, it is too completely bound up with English circumstances to be regarded as suitable for the colonies unless specially adopted.<sup>1</sup>

Such law as introduced can, of course, be altered by the local legislature. That was made clear by the Colonial Laws Validity Act, 1865. On the other hand, except under the powers given by the Statute of Westminster, the local legislature cannot alter any Imperial Act which expressly or by necessary intendment applies to the territory, or any regulation thereunder, having the force of law. Such statutes are the second source of the law of any territory. A third is constituted by local Acts and regulations thereunder; in the federations and the Union there are both federal or Union and provincial or State laws and regulations to consider. Further, each territory necessarily develops a customary law which supplements and adapts to local conditions the common law. But such development of law is never likely to assume substantial shape as long as there is the overruling authority of the Privy Council to control deviations from the English norm.

In the case of Quebec the basis of the law is the Custom of Paris as modified in some measure to suit local conditions by royal legislative orders and local usage. The conquest and cession prevented Quebec from receiving the benefit of the Code Napoléon, while the Quebec Act, 1774, shut it out from sharing in the modernisation of the law merchant promoted by Lord Mansfield, and perpetuated the seigniorial system until it was swept away in 1855 as burdensome. The civil law of Quebec which has been codified has naturally

<sup>1</sup> See Chapter XVIII, *post.*

been largely influenced by the Code Napoléon, but it remains divergent in many respects both from modern Continental law based on that code and from English law, though it has been subjected to strong influence through the judgments of the Supreme Court and of the Privy Council. Nevertheless the distinction between the systems has been sufficient to prevent anything like the degree of assimilation seen in the Union of South Africa, and *rapprochement* has been hindered by the existence of the code. On the other hand, the authority of precedents has been more or less insisted upon, though by no means whole-heartedly acted upon.

In Canada, Australia, New Zealand, and the Union it has been felt necessary in varying degree to recognise the existence of native laws as applicable to transactions affecting the indigenous races. In Canada recognition is accorded to the status of Indians still living under tribal conditions, though efforts are made to accelerate the transfer of natives from this status to equality before the law. Any measure of compulsion naturally has evoked protests, which have been on the whole effective in securing respect for Indian wishes. An interesting recent development is that of combined action between the various groups to present tribal claims to the Government at Ottawa which is responsible for relations with them, legislative power resting with Parliament.

In Australia the overwhelming superiority of the European settlers to the small bodies of natives found in occupation of the territories originally occupied resulted in native rights being ignored and in the application to the aborigines of English law.<sup>1</sup> Recognition, of course, was inevitable that

<sup>1</sup> *R. v. J. C. Murrell*, 1 Legge 72. Contrast the New Zealand view in *R. v. Rangihaeata*, New Zealand Gazette, March 8, 1843.

Chapter XI. in civil matters the natives could not be subjected to English rules, but this applies now virtually only to the more numerous and half-civilised, or quite uncivilised natives of the north of the continent, including the Northern Territory, even the criminal law being in some measure modified in its application to them, since simple enforcement would be manifestly unjust.

In New Zealand, on the other hand, the warlike character and more advanced civilisation of the Maoris rendered recognition of native rights inevitable, and, while in theory<sup>1</sup> English criminal law applied forthwith to the natives after the cession, it was modified in its application by statute, and only gradually applied in full effect. In civil law the necessity of respecting the Maori land system was recognised in theory from the first, and acted upon effectively from 1862 when a Native Land Court was set up, and native rights were further protected by the Native Rights Act, 1865, which made the position of all the natives as British subjects certain, but also secured their customary land law. It has since repeatedly been recognised in the courts as binding even the Crown; the apparent view in *Wi Parata v. Bishop of Wellington*,<sup>2</sup> that against the *ipse dixit* of the Crown the natives could assert no rights in the courts, having been undermined by the Privy Council ruling in *Nireaha Tamaki v. Baker*<sup>3</sup> and rendered innocuous by the local decision in *Tamihani Korokai v. Solicitor-General*.<sup>4</sup> The rules of intestate succession remain Maori, though in 1909 adoption for succession purposes was abrogated as no longer necessary.

In the Union from the outset native laws had to be

<sup>1</sup> Cf the Wairau proceedings (1843), Parl. Pap. 1844 (556) App. pp. 173 ff.

<sup>2</sup> (1877), 3 N.Z. Jur. 72

<sup>3</sup> [1901] A.C. 561

<sup>4</sup> (1912), 32 N.Z.L.R. 321.

recognised *de facto*, and the extension of the Cape led to the incorporation of great areas inhabited by native populations, among whom justice had to be administered whether by their own chiefs or by magistrates on native lines modified to meet considerations of justice and humanity. The same conditions affected Natal in even stronger measure, and also the Dutch Republics, which after annexation ultimately came together in the Union. Natal led the way in distinctive treatment of native law which it codified in 1891, entrusting its operation to a Native High Court. Both institutions, though altered, survive,<sup>1</sup> and the code can be modified easily by executive legislation under the Native Administration Act, 1927, which deprives the natives of the measure of protection formerly afforded by the necessity of action through Parliament. In the Cape formal recognition of native law dates from 1897, when, on annexation of the Transkeian territories, authority was given to the magistrates to apply at discretion native law and custom in cases between natives. In British Bechuanaland, which had been a Crown colony, chiefs had been given, by Proclamation 2 of 1885, exclusive civil jurisdiction between natives of their own tribes, and a minor criminal jurisdiction, which is with variations continued by Section 21 of the Act of 1927. The Act continues the system in operation in the Transkei empowering the Governor-General in Council to modify native law, a power new in the Cape.

In the Transvaal native law has a limited recognition under the old republican law No. 4 of 1885, continued and supplemented by ss. 70, 71 of Proclamation No. 28 of 1902. But, unlike Natal law, the Transvaal does not accept the native marriage customs or recognise marriage by such

<sup>1</sup> See Act No. 49 of 1898, s. 80; Kennedy and Schlosberg, *South African Constitution*, pp. 399 ff.

**Chapter XI.** custom as a true marriage,<sup>1</sup> so that the bride-price is no longer recoverable,<sup>2</sup> native women are not in law perpetually minors,<sup>3</sup> and a mother is entitled to the guardianship of her children by a native union.

In the Orange Free State native rules of succession and guardianship are recognised, and in the Witzieshoek reserve the chief is authorised to hear minor civil cases according to native law.

Native law in any case is not applied when one party is a European,<sup>4</sup> and it normally must be proved as a matter of fact.<sup>5</sup> Where it provides no remedy, the ordinary law is applied.<sup>6</sup> Nor, of course, will the courts give effect to any law contrary to public order or policy, morality, equity, or natural justice. Naturally, incestuous marriages<sup>7</sup> are refused recognition and anything in the nature of slavery; a woman cannot be treated as a chattel nor an inherited right to enforced services or in her person be permitted. Moreover, if any person contracts a Christian marriage, all marital rights fall to be dealt with under Roman Dutch law, to the exclusion of native law.<sup>8</sup>

A very slight measure of recognition is given to the special position of British Indians except in the case of Natal, where their marriage customs were accorded a certain measure of legal recognition<sup>9</sup> which is still applicable. Immigration of Indians is normally absolutely prohibited, with an exception for wives (monogamous *de facto*) and

<sup>1</sup> *R. v. Nalana*, [1907] T.S. 407.

<sup>2</sup> *Kaba v. Ntela* [1910] T.S. 964.

<sup>3</sup> *Meesedoosa v. Links*, [1915] T.P.D. 357.

<sup>4</sup> *Msindo v. Moriarty*, 16 S.C. 539.

<sup>5</sup> *Sengane v. Gondele* (1880), 1 E.D.L. 195.

<sup>6</sup> *Willie Nguma v. Jemima Koni*, 3 N.A.C. 162

<sup>7</sup> *Nggobela v. Sihele*, 10 S.C. 346.

<sup>8</sup> G. M. B. Whitfield, *South African Native Law* (1930), p. 5.

<sup>9</sup> *Thuku Ram v. Chundravathi* (1936), 5 S.A.L.T. 102.

children of domiciled Indians under a certificate of the minister given by virtue of s. 4 (1) (a) of the Immigrants' Regulation Act, 1913. It was held in *R. v. Padsha* that a notice declaring all Indians unsuited for immigration on economic grounds was not so unreasonable as to justify interference by the court on the score that the minister was acting on racial, not on economic grounds.<sup>1</sup>

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(4) In addition to jurisdiction derived from Dominion legislation, the Supreme Courts of the Dominions and States are by the Colonial Courts of Admiralty Act, 1890, given—subject to Dominion legislation—the powers of admiralty jurisdiction which at that time were possessed by the Admiralty Division of the High Court of Justice in England. But the powers of such courts were restricted as regards powers under the Slave Trade Act, 1873, and the Naval Prize Act, 1864, to such authority as in these measures is conferred on Vice-Admiralty Courts, and the courts have no power to act in prize without special authorisation, for which provision is made in the Prize Courts Act, 1894, and subsequent legislation. Moreover such powers only as are granted by Order in Council may be exercised over the Royal Navy, and no crime which may be tried in England on indictment may be tried under the powers given by the Act. The Dominion legislatures may create inferior courts of admiralty with limited jurisdiction, but any Act either declaring a Supreme Court a court of admiralty or creating inferior jurisdictions must contain a suspending clause or be reserved, and rules of court under the powers given by the Act must be approved by the King in Council. The Statute of Westminster, 1931, s. 6, takes away the necessity of reservation or a suspending clause and that of confirmation of rules by Order in Council, while the restriction of

<sup>1</sup> [1923] A.D. 281.

Chapter XI. authority to the power of the English Admiralty Division in 1890 is now no longer binding under Section 2 of the Statute.

In Australia the State Supreme Courts have exercised admiralty jurisdiction, though their right to do so has recently been questioned by Mr. Latham<sup>1</sup> on the ground that the High Court in *John Sharp & Sons v. The Katherine Mackall*<sup>2</sup> has laid it down that the Commonwealth is a British possession under Section 2 of the Colonial Courts of Admiralty Act, 1890, so that the High Court has admiralty jurisdiction exclusively in view of the grant of such jurisdiction by the Judiciary Act, 1903-20, s. 30A. In that case the States' position is questionable, but it seems impossible to deny the validity of a jurisdiction so long exercised. The States are still bound by the Colonial Laws Validity Act, 1865, and their laws as to jurisdiction are subject to the restrictions above mentioned.

Criminal jurisdiction in respect of crimes committed within the jurisdiction of the Admiral in English law when the accused are found in the Dominions is granted under the Admiralty Offences (Colonial) Act, 1849. This jurisdiction applies to British ships even in foreign territorial waters, including navigable rivers, even in the case of foreigners.<sup>3</sup> But in *R. v. Keyn*<sup>4</sup> it was ruled that the Admiral's jurisdiction did not apply to foreigners who committed an offence from a foreign ship on persons in a British ship in British

<sup>1</sup> *Australia and the British Commonwealth*, p. 108.

<sup>2</sup> (1924), 34 C.L.R. 420; cf. *McArthur v. Williams* (1936), 55 C.L.R. 324, 359, 360; *Union Steamship Co. v. The Ship Caradale* (1937), 56 C.L.R. 277.

<sup>3</sup> *R. v. Anderson* (1868), L.R. 1 C.C.R. 161, *R. v. Carr* (1882), 10 Q.B.D. 76; Stephen, *Hist. Crim. Law*, II 4-8.

<sup>4</sup> (1876), 2 Ex. D. 63. The extent of British jurisdiction is for the Crown to declare in case of doubt. *The Fagernes*, [1927] P. 311. No doubt this would now be done in Dominion courts by a Dominion minister. Canada claims Hudson Bay as territorial waters; Wheaton, *International Law* (ed. Keith), I. 365, 404.

territorial waters. This decision, which is probably unsound, was rendered innocuous by the Territorial Waters Jurisdiction Act, 1878, which is a declaratory Act, but by it, while offences of this kind are within Dominion jurisdiction, the consent of the Governor is required for prosecutions. The power, however, to prosecute in such cases is regularly assumed as part of the local law and exercised without formal assent. By an Act of 1874 the local penalty or the English penalty may be applied in respect of crimes punished under Admiralty jurisdiction.

The Merchant Shipping Act, 1894, s. 686, confers a general power to punish any British subject committing an offence (1) on any British ship anywhere or (2) on any foreign ship to which he does not belong, and any alien committing any offence on any British ship on the high seas only.<sup>1</sup> By Section 687 a rather wide power is given against any master, seaman, or apprentice for any offence committed ashore or afloat, if within three months he has been a member of the crew of a British ship. Section 478 of the same Act authorises Dominion legislatures to make provision for enquiries into shipping casualties when a vessel is registered in the Dominion or the accident has happened in its vicinity or to a British ship *en route*. From such enquiries and orders on cancellation of certificates of officers an appeal lies to the High Court in England,<sup>2</sup> and the Board of Trade may order a rehearing; but the appeal does not apply if the vessel were registered in the Dominion or the certificate is a foreign one. But the Board may order the return of any certificate or the reduction of the period of its suspension. These powers are now subject to repeal by the Dominions under the Statute of Westminster, and the

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<sup>1</sup> *Robey v. Vladimier* (1935), 52 T L R 22

<sup>2</sup> *The Chilston*, [1920] P. 400. See S.R. & O. 1923, No. 752, s. 19.

Chapter principles laid down by the British Commonwealth Agreement of 1931, noted above, are applicable.

XI. Further powers are also conferred on Dominion courts under the Slave Trade Acts, the Pacific Islanders Protection Acts, 1872 and 1875, the Foreign Enlistment Act, 1870, re-enacted as a Canadian Act in March 1937, the Fugitive Offenders Act, 1881, as regards crimes committed on the boundary of possessions<sup>1</sup> or on a sea voyage between them, the Army Act, the Air Force Act, the Official Secrets Acts, 1911 and 1920, the Acts as to treason<sup>2</sup> and as to coinage offences, the Extradition Act, 1870, the Geneva Convention Act, 1911, and the Act of 1912 to enforce the quadrupartite sealing convention of 1911. Ascertainment of law is provided for by the British Law Ascertainment Act, 1859, and the Foreign Law Ascertainment Act, 1861, and foreign evidence by the Foreign Evidence Act, 1856. Under the Statute of Westminster the Dominions, as opposed to the States, have full power now to repeal or alter these measures as they desire, so far as they constitute part of the Dominion law.

It is open to the Crown by Commission under the Great Seal to authorise the Admiralty to establish Vice-Admiralty Courts, even when Colonial Courts of Admiralty exist, but in the Dominions and States such courts can only exercise jurisdiction in prize, as to the navy, the slave trade, foreign enlistment, the Pacific Islanders Protection Acts, and issues involving treaties or international law.<sup>3</sup> Such Dominion

<sup>1</sup> Including the Union despite its new status: *Basutoland case* (1936), Keith, *Journ. Comp. Leg.* xix. 117 f.

<sup>2</sup> Local legislation is also normal, for the Irish Free State see the Treasonable Offences Act, No. 18 of 1925, Constitution of Éire, Art. 39, for the Union Common Law, see Keith, *Journ. Comp. Leg.* xviii. 285, 286.

<sup>3</sup> In the local Admiralty Court at Victoria, British Columbia, in 1930, four American vessels were condemned for illegal presence in Canadian waters, mainly

jurisdiction in prize was conferred in certain cases during the war, but the question of prize jurisdiction and the other matters involved may now be dealt with by the Dominions under the Statute of Westminster, though the Imperial Conference of 1930 agreed that action on this head should be deferred until agreement on principles was reached. It is clearly desirable that there should be uniformity throughout the Empire in this issue. The settlement will no doubt carry with it the disposal of all questions of the treatment of the sums raised from condemnations of vessels and property as prize, an issue which after the war was settled by agreement between the British and Dominion Governments.

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The new powers of the Dominions as to admiralty jurisdiction will enable them to extend that jurisdiction according to their view as to what is fit. The limits of the past situation have unquestionably been inconvenient, especially in Canada where the Exchequer Court<sup>1</sup> exercises the full jurisdiction usually vested in the Supreme Courts of other territories. But it is important that in this matter, as in prize, the extent of jurisdiction should be assimilated as far as possible to the British model.<sup>2</sup>

#### (5) The principle that an appeal lies to the King in Council

<sup>1</sup> claiming the benefit of the treaty of 1818, which was held not to apply to the Pacific coast, *The May v. R.*, [1931] S.C.R. 374, *The Queen City v. R.*, *ibid* 387 (on appeal)

<sup>2</sup> With local judges in the provinces. This renders Imperial creation of Vice-Admiralty Courts needless. For the disadvantage of limited jurisdiction, see *Bow, MacLachlan & Co v. Ship Camosun*, [1909] A.C. 597; *The Yuri Maru, The Woron*, [1927] A.C. 906, Keith, *Journ. Comp. Leg.* ix. 254; xi. 262, 263. Piracy is triable in any Admiralty Court by the law of nations: *A.G. of Hong Kong v. Kwok-a-sing* (1873), L.R. 5 P.C. 179; for its character see *Piracy Jure Gentium, In re*, [1934] A.C. 586. On the criminal jurisdiction as regards offences on board ships under the Merchant Shipping Act, 1894, s. 686, see *Robey v. Vladivostok* (1935), 52 T.L.R. 22.

<sup>2</sup> Canada in the Admiralty Act, 1934, accordingly extended the jurisdiction of the Court of Exchequer as the Court of Admiralty as in the Supreme Court of Justice (Consolidation) Act, 1925.

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from all judgments of colonial courts is an old one.<sup>1</sup> The prerogative right to hear appeals was made statutory in 1844; after that it could be limited only by Imperial Act,<sup>2</sup> as was done in the case of the Commonwealth of Australia and the Union of South Africa as has been seen above, until by the Statute of Westminster, 1931, power was given generally to abolish the appeal if desired. But the States of Australia have not this authority.

The system of appeals<sup>3</sup> which has been set up is simplified by the activity of the Privy Council Office after the Colonial Conference of 1907, when the issue was discussed. The general doctrine is now laid down that appeals shall normally be contemplated only from the highest court in each territory. From it, it shall lie either (1) as of right when certain conditions are fulfilled, or (2) by special leave of the local court when in its opinion the question involved is one which, by reason of its great general or public importance or otherwise, ought to be submitted to the King in Council for decision, or (3) by special leave obtained from the Judicial Committee itself. The use of the special power applies both to cases where the local court has not seen fit to grant leave to appeal, and to appeals from inferior courts, which are normally not permitted, but which it is within the power of the Judicial Committee under the Act of 1844 to admit. The condition for an appeal of right<sup>4</sup> is normally that the matter in dispute is of the value of £500 or upwards, or that the appeal involves directly or indirectly some claim

<sup>1</sup> Keith, *Constitutional History of the First British Empire*, pp. 305-11.

<sup>2</sup> *Nadan v. R.*, [1926] A.C. 482; *Webb v. Outram*, [1907] A.C. 81.

<sup>3</sup> N. Bentwich, *Privy Council Practice* (1937).

<sup>4</sup> In a few cases the rules as to appeal are laid down by local Act, not Order in Council. This is so for historical reasons (the Constitutional Act of 1791) in Ontario and Quebec. Even though the appeal is of right the Court should allow it: *Davis (Lady) v. Shaughnessy (Lord)*, [1932] A.C. 108. It is permissible to appeal from the refusal to allow an appeal and also to ask special leave.

or question respecting property or other civil right of the value of £500 or upwards. The sum varies from the normal in certain cases; it is £300 in New Brunswick, 4000 dollars in Ontario and Saskatchewan, £1000 in Alberta and Manitoba, and 12,000 dollars in Quebec. In New Zealand an appeal lies not merely from the Court of Appeal but from the Supreme Court, in the latter case it may be brought only by leave of that Court or by special leave of the Privy Council. In the case of the Union no appeal lies save from the Appellate Division, and then only by special leave from the Privy Council.<sup>1</sup> Appeals from the High Court of the Commonwealth lie only by special leave, or in cases involving the constitutional rights of the Commonwealth and the States *inter se* or of the States *inter se* on a certificate from the High Court.<sup>2</sup> From the Supreme Court of Canada, appeal lies only by special leave of the Privy Council, and so with the Court of Exchequer in part of its jurisdiction. In the Irish Free State appeal lay, until abolished in 1933, only from the Supreme Court by special leave of the Council. It must be added that as regards Admiralty jurisdiction an appeal lies of right under the Colonial Courts of Admiralty Act, 1890 (which the Dominions, but not the States, can now repeal in this regard), from all such courts to the Privy Council, and no local legislation could formerly bar this right of appeal.<sup>3</sup>

The principles on which the Privy Council will grant special leave are quite indeterminate. It will not do so in electoral appeal cases,<sup>4</sup> on the score that there are pressing reasons of convenience that such appeals should not be

<sup>1</sup> South Africa Act, 1909, s 106.

<sup>2</sup> Const. s. 74 See p. 69 *ante*

<sup>3</sup> *Richelieu and Ontario Navigation Co v. Owners of S.S. Breton*, [1907]

A.C. 112

<sup>4</sup> *Theberge v. Laundry* (1876), 2 App. Cas. 102, *Strickland v. Grima*, [1930] A.C. 285.

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allowed and that the reference of these issues to courts is really a surrender of the right of the legislature to determine such issues itself, and is therefore of a special character, to which the ordinary rules of appeals should not apply. Moreover, if a court is established to deal with land questions on the basis of equity and good conscience, no appeal will lie.<sup>1</sup> It is otherwise if the court is appointed generally to deal with the land rights of natives in New Zealand, which is a normal judicial function and performed on judicial lines. But no appeal will be allowed from a court-martial under martial law, for such a body is clearly not a judicial body in the proper sense.<sup>2</sup> Nor will leave be granted in criminal cases under normal conditions, but only when "it is shown that by disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done".<sup>3</sup> From the Dominions cases of this kind are of negligible consequence. Moreover, the importance of the rule of refusing leave is emphasised by the fact that the Council declined to grant leave when the action impugned as criminal was merely so under the terms of a provincial Act in Canada, where the provinces are by the constitution denied the power of enacting criminal law in the normal sense of the term.<sup>4</sup> An

<sup>1</sup> *Moses v Parker*, [1896] A C 245 as against *Wt Matua's Will, In re*, [1903] A C 448; *C P.R. Co. v. Toronto Corp'n*, [1911] A C 461.

<sup>2</sup> *Tilonko v A.-G. of Natal*, [1907] A C. 93, 461, *Mgomini, Ex parte*, 22 T L R 413; *Clifford and O'Sullivan*, [1921] 2 A C. 570.

<sup>3</sup> *Dullet, In re* (1887), 12 App Cas. 459 (British Honduras); *Deeming, Ex parte*, [1892] A C 422, *Kops, Ex parte*, [1894] A C 652 (New South Wales); *Tshingumuzu v. A.-G. of Natal*, [1908] A.C. 248, *Badger v. A.-G. for New Zealand* (1908), 97 L T 621. See also *Arnold v. King Emperor*, [1914] A C. 644, and contrast *Knowles v R*, [1930] A C 366, *Lawrence v R*, [1933] A.C. 699; *Mahadeo v R*, [1936] W N 203 with *Attygalle v R*, [1936] A C 338.

<sup>4</sup> *Chung Chuck v R*, [1930] A C 244 Cf *Fong, Ex parte*, [1929] 1 D.L.R. 223; on the nature of habeas corpus as civil. *Keith, Journ. Comp. Leg.* xii. 105, 106, *A.-G. for Canada v. Fedorenko*, [1911] A C. 735.

appeal, however, has been heard, though dismissed on the merits, from the decision of a special court in Natal dealing with a charge of treason; the nature of the defence, the issue of the position of an alien resident in British territory on its occupation by alien enemies, no doubt explains the action taken<sup>1</sup>

In general it may be said that the Privy Council is not anxious to exercise freely the right to grant special leave to appeal from Dominion courts. It has had regard to the growth of Dominion status and to the state of Dominion feeling with regard to the appeal. Thus in *Prince v. Gagnon*<sup>2</sup> the criterion adopted was that the case should be of some gravity, involving some matter of public interest, or important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character, and the same doctrine was enunciated in *Daily Telegraph v McLaughlin*<sup>3</sup> for appeals from the High Court of the Commonwealth. It must, however, be understood that in every case which is heard there must be a substantial point of law involved; no amount of importance will result in leave being given if the court below had clearly a sound view of the law. This was insisted on in *Minister for Trading Concerns for Western Australia v. Amalgamated Society of Engineers*,<sup>4</sup> when a strong effort was made to persuade the Council to hear the arguments proving that the decision in *Amalgamated Society of Engineers v. Adelaide Steamship Co.*<sup>5</sup> was unsound and that the issue involved was not one of powers of the

<sup>1</sup> *De Jager v. A.-G of Natal*, [1907] A.C. 326. Appeal lies in case of contempt of court; *Ambard v. A.-G. of Trinidad*, [1936] A.C. 322.

<sup>2</sup> (1882), 8 App. Cas. 103, 105.

<sup>3</sup> [1904] A.C. 776

<sup>4</sup> [1923] A.C. 170 Cf *Cité de Montréal v. Eccl. de St. Sulpice*, 14 App. Cas. 660; *Wifley Ore Concentrator Syndicate Ltd v. Guthridge*, [1906] A.C. 548

<sup>5</sup> (1920), 28 C.L.R. 129.

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Commonwealth and States *inter se*. In like spirit the Council will decide only issues which have reality.<sup>1</sup> It dropped the famous question<sup>2</sup> of the right of the States to tax the salaries of federal officers, despite the conflict between its view and that of the High Court, as soon as the Commonwealth legislated to allow salaries to be taxed.

Another principle, which is perhaps not very consistently followed in the case of the federations, is to refuse to give special leave to appeal where the appellant has himself taken the case in the first instance to the Supreme Court, or the High Court, without exercising the alternative right of direct appeal to the Privy Council.<sup>3</sup> But not very great importance must be attached to this doctrine, because the Council in Canadian cases is fond of alluding to the value of the views of the Supreme Court in such cases, and obviously, while the final interpretation must lie with the Council, it is desirable to utilise the ability of that Court in the utmost measure. Apart from constitutional cases, the tendency in Canada is to limit appeals to far-reaching questions of law or questions of dominant public importance.<sup>4</sup> But there are exceptions.<sup>5</sup>

Australian appeals are comparatively seldom entertained unless they touch on constitutional issues outside the purview of the *inter se* provisions of the constitution, as in *James v. The Commonwealth*,<sup>6</sup> or affect the State constitutions,

<sup>1</sup> *Taylor v. A.-G. for Queensland*, [1918] W.N. 85.

<sup>2</sup> See chap. xii. (6) *post*.

<sup>3</sup> *Clergue v. Murray*, [1903] A.C. 521 (Canada), and *Victorian Railway Commrs. v. Brown*, [1906] A.C. 381.

<sup>4</sup> *Albright v. Hydro-Electric Power Comm. of Ontario*, [1923] A.C. 167.

<sup>5</sup> See *Brownlee v. Macmillan, The Times*, June 18, 1937, where the only point as regards an appeal from the Supreme Court of Canada was the construction of a statute giving a woman a right to claim damages for seduction (R.S.A. 1922, c. 102).

<sup>6</sup> [1936] A.C. 578, a very sound decision. Cf. *James v. Cowan*, [1932] A.C. 542; *Shell Co. v. Federal Commr. of Taxation*, [1931] A.C. 275.

as in *Attorney-General for New South Wales v. Trethewan*.<sup>1</sup> An important instance of the type of appeal allowed is that in *Grant v. Australian Knitting Mills Ltd.*,<sup>2</sup> which turned on the interpretation of s. 14 of the Sale of Goods Act, 1895, of South Australia, which followed the English Act of 1893. Not only was the meaning of that Act involved but also the effect of the decision of the House of Lords in *Donoghue v. Stevenson*.<sup>3</sup> Had the restrictive interpretation adopted by the High Court, overruling the Court of South Australia, been accepted, there would have been established a definite divergence between the law of the United Kingdom and that of the Dominions as regards a matter of so much everyday interest as the right of a purchaser to recover against the retailer in contract, and the manufacturer in tort, in respect of articles, *prima facie* sound, but containing dangerous ingredients as the result of some negligence in production.

There is no doubt, of course, that the division of authority in constitutional issues is perplexing,<sup>4</sup> though the Privy Council in *James v. The Commonwealth* served a valuable purpose in extricating the High Court from an impasse, which, however, would doubtless have been overcome by the action of the High Court, if it had not had this way out. There are two possible remedies, to extend the appeal as the late Mr. W. A. Holman suggested,<sup>5</sup> and is now supported by Mr. T. C. Brennan,<sup>6</sup> or further to limit it. There is a certain amount of feeling among supporters of State rights in favour of the former course, but nothing decisive, and some Commonwealth supporters take the like view, thinking

<sup>1</sup> [1932] A.C. 526

<sup>2</sup> [1936] A.C. 85.

<sup>3</sup> [1932] A.C. 562

<sup>4</sup> Cf Constitution Commission Report, 1929, p. 253

<sup>5</sup> *The Australian Constitution* (1928), p. 81

<sup>6</sup> *Interpreting the Constitution* (1935), ch. xxviii.

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that the jurisprudence of the Council is well adapted to meet federal needs. But the *vis inertiae* renders any action, even to limit the appeal from the High Court which is within the powers of the Commonwealth, far from probable.

Appeals from New Zealand are relatively more frequent, partly because they lie in certain cases as of right. Their importance lies in the fact that they illumine points of English law and keep the systems in touch, as in the decision that in accordance with English law sufferers in the earthquake injured by damage to premises were entitled to compensation for injury.<sup>1</sup> Another recent decision<sup>2</sup> affirming the Court of Appeal has expounded the doctrine of the mode of payment in English currency of interest coupons on bonds issued in New Zealand but payable in London or Auckland. There is no movement in the Dominion in favour of abolition of the appeal, which has distinct value as helping New Zealand credit in the London money market, by no means a negligible point, as would soon be felt were the appeal to be abolished.

The constitution of the Privy Council for judicial purposes has been determined by a series of Acts each enlarging the field of Dominion judges who may be members. The net result is that the Council is composed of the Lord Chancellor and ex-Lords Chancellor, the Lord President, who if a judge like Lord Parmoor can intervene in the constitution of the divisions, and ex-Lords President; present and past members of the Supreme Court in England, and the seven Lords of Appeal in Ordinary if Privy Councillors are members, and also any judge or ex-judge of a

<sup>1</sup> *Brooker and Ryan v. Thomas Borthwick & Sons (Australasia) Ltd.*, [1933] A.C. 669 Cf *Thom v. Sinclair*, [1917] A.C. 127

<sup>2</sup> *Auckland Corp'n v. Alliance Ass Co* (1937), 106 L.J.P.C. 40, *Adelaide Electric Co's Case*, [1934] A.C. 122. Contrast *Mount Albert Borough Council v. Austr. Ass Soc* (1937), 54 T.L.R. 5.

superior court in the Dominions, States, or provinces, provided he is a Privy Councillor.<sup>1</sup> The right to appoint Privy Councillors still rests, and must rest, with the King on the advice of the British Government, which thus no doubt controls the composition of the court. Moreover, no salaries are provided for Dominion judges by the British Exchequer. Under an Act of 1915 the Council may sit in more than one division.

(6) To the appeal many objections have been raised by critics in the Dominions, but it is clear that on the whole legal opinion there still favours the appeal, though no doubt the consideration that it affords a valuable source of profit to leading counsel has some weight in this preference. The merits of the appeal should not be denied. Unquestionably in the opinion of the major portion of Canadian lawyers it has served as a most valuable means of dealing with impartiality with the contests which have raged round the interpretation of the Dominion constitution, especially questions affecting religion, language, or race. It cannot be denied that it is invidious for Canadian judges to deal with such acute problems dividing political parties without the risk of being accused of partisanship by one side or the other. Again, the Council has laid down a common basis of interpretation of the royal prerogative,<sup>2</sup> a matter on which Canadian decisions once showed much confusion of thought. It has also enforced the similarity of interpretation of Acts adopted by the Dominions from British Acts. Under its judgments the courts of the Dominions should follow the interpretation put on such measures in England by the

<sup>1</sup> The number has reached ten, but is now lower. For Indian appeals two judges are provided by the Appellate Jurisdiction Act, 1929. On the Lord President's right to fix the composition of the Court see Parmoor, *A Retrospect*, p. 198.

<sup>2</sup> Cf. Vaughan, C.J., in *Process into Wales*, Vaugh. 395, 402.

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Court of Appeal<sup>1</sup> or the House of Lords.<sup>2</sup> In view of the otherwise inevitable deviation between parts of the Empire in construing the same statutes, this influence must be admitted to be of value. In the past also it has enforced the true interpretation of Imperial Acts applying to the Dominions, and upheld the supremacy of Imperial legislation, but this function is now important only as regards the States. More valuable is the work done in interpreting the common law which lies at the base of the legal system of all the Dominions save Quebec and the Union. When it is remembered that the different States of the United States are free to interpret their common law in very different ways, the advantage of a common interpretation is not negligible, though, on the other hand, the Dominions are more active in amendments of that law than the United Kingdom has been in the past. Nor should there be ignored the sentimental value attaching in many minds in the Dominions to the appeal to the King as in some way a link of Empire, especially at the time when such links are being reduced almost to invisibility. The fact that the finding of the Judicial Committee is not strictly speaking a judgment,<sup>3</sup> but

<sup>1</sup> *Trimble v. Hill* (1879), 5 App. Cas 542; cf. *Fed. Commr. of Taxation v. Hipsleys Ltd* (1926), 38 C L R 219, 234, *Stuart v. Bank of Montreal* (1909), 41 S.C.R 516, 548, *Brooker v. Borthwick & Sons (Australasia) Ltd*, [1933] A.C. 669.

<sup>2</sup> Even if this differs from an earlier view of the Privy Council, e.g. as to the degree of care in drawing cheques *Will v. Bank of Montreal*, [1931] 3 D.L.R. 526 which followed *London Joint Stock Bank v. Macmillan*, [1918] A.C. 771, against *Colonial Bank v. Marshall*, [1906] A.C. 559; see *Robins v. National Trust Co. Ltd.*, [1927] A.C. 515. There are conflicting views in Canada: *Negro v. Pietro's Bread Co. Ltd.*, [1933] 1 D.L.R. 490; *Jeremy v. Fontaine*, [1931] 3 W.W.R. 203; *Ford, J., Alberta Law Quarterly*, ii. 5 ff.; *Keith, Journ. Comp. Leg.* xv. 261; xvi. 133. But the dissent of the Court of Appeal in *Fanton v. Denville*, [1932] 2 K.B. 309 from *Toronto Power Co. v. Paskman*, [1915] A.C. 734, on the doctrine of common employment, is overruled now in *Wilsons and Clyde Coal Co v. English* (1937), 53 T.L.R. 944.

<sup>3</sup> The judgment aspect appears prominent in *British Coal Corporation v. R.*, [1935] A.C. 500.

is promulgated as an order of the King in Council, has an effect which is not unimportant, however much it may be deemed irrelevant from the purely logical standpoint.

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The objections<sup>1</sup> are many and of very varying weight. The constitutional objection that the appeal is a sign of Dominion dependence on the United Kingdom has been deprived of value by the Statute of Westminster, which puts in legal form the right of the Dominions to choose their own final Court of Appeal. The objection to the personnel of the court means in essence that it is in fact essentially constituted of British judges, since no salaries are provided either imperially or locally for the services of such Dominion members as there are. That could be remedied by Dominion or British action if it were the only issue involved. The objection that the court may contain a Lord President is based on the mistaken idea that the Lord President, if not a judge, ever sits to hear judicial appeals, the presence of the Lord Chancellor is a different matter, but English legal tradition denies that, sitting on such an appeal, the Chancellor can be influenced by political grounds. It may be admitted that on one or two occasions that view may be over-generous. That the judges are affected by patriotic<sup>2</sup> bias cannot be supported by any evidence, still less that they are more subject to class bias than Dominion judges, or that they favour money as against poverty. More substantial complaints are based on expense. It is certain that the system gives a great advantage to the wealthy litigant and the great company or corporation, which can coerce

<sup>1</sup> H. Hughes, *Judicial Autonomy in the British Commonwealth* (1931). In the Union of South Africa the issue is not urgent, the appeal being very rare.

<sup>2</sup> This is alleged in the Irish Free State, but unproved, and it was not exhibited in prize cases in the war of 1914–18. The same accusation has been made of Irish Free State judges. Clearly the Lord Chancellor should not sit on an issue in which the Government is interested, as in *Maraus, Ex parte*, [1902] A.C. 109.

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XI. an opponent into surrender or compromise by the power to take him to the Privy Council. Delay again is a very grave factor, though the delay lies normally in the acts of the parties, one or both of whom may desire to postpone a decision. The absence of local knowledge unquestionably is a disadvantage both to the court and to counsel, while it is often very expensive to send local counsel to England, and even then they may find the court insufficiently in touch with the facts of Dominion life to appreciate the Dominion point of view. A more serious objection still is the fact that the court is apt to dispose of issues on some ground which, however valid, does not touch the heart of the matter, and thus leaves unsolved the very problem which it was the desire of the parties to raise and have determined as guidance in subsequent cases. It is sometimes objected that the fact that only one decision is given without indication of dissenting views is objectionable; but that is not apparently the opinion of the Dominion Governments, for a decision to allow the presentation of dissents adopted by the Imperial Conference of 1911, was promptly repudiated by the Governments on further consideration.<sup>1</sup> Nor is it of importance that the court is not strictly bound by precedent.<sup>2</sup> It would, of course, be deplorable if it were lightly to vary judgments, but all that it has ever asserted is the right to reconsider an early ruling in the light of much fuller knowledge of the relevant circumstances, and the cast-iron rule of the House of Lords as to precedent would be even more inconvenient than it is if it were not for the remarkable ingenuity which

<sup>1</sup> The disadvantages of several judgments are seen in *Great Western Ry. v. Mostyn*, [1928] A.C. 57.

<sup>2</sup> *Transferred Civil Servants (Ireland) Compensation, In re*, [1929] A.C. 242; *Ridgeway v. Clifton* (1877), 2 P.D. 306; *Read v. Bishop of Lincoln*, [1892] A.C. 644; *Ottoman Bank v. Chakarian* (1937), 54 T.L.R. 122, correcting *Ottoman Bank v. Dascalopoulos*, [1934] A.C. 354.

their Lordships can show when it comes to distinguishing subsequent cases from earlier decisions.<sup>1</sup> It is perhaps better in such cases frankly to admit a change of view, as does the Supreme Court of the United States, and, even on the most vital principle of the interpretation of the constitution, the High Court of the Commonwealth of Australia. Much more serious is the fact, not usually made a subject for criticism, that the principles on which appeals are admitted for consideration or leave refused on application are far from intelligible. As the judgments do not give reasons for dismissing applications to appeal, this defect is less noted than otherwise it would be; worst of all is the fact that appeals may be held admissible by one division, and when the matter comes up for discussion on the merits the issue may be reopened and the appeal ruled inadmissible, as in the Maltese case of *Parnis v. Agius*,<sup>2</sup> where an appeal from a decision on an electoral petition was held applicable by the Council, but later ruled to be invalid.

The most serious objection to the appeal is one which has been stressed by Dominion critics, the implication, on the one hand, that Dominion judges are not capable of dealing satisfactorily with appeals, and the tendency, on the other hand, to neglect in composing Dominion courts the very best intellects of the bar. The general opinion in the Dominions appears to be that the final courts of appeal must be strengthened in composition if they are to be regarded as satisfactory substitutes for the Privy Council. The salaries offered in Canada are clearly too low to attract men of first-class ability, unless they deliberately prefer judicial ease.<sup>3</sup> When it was objected by the United States that the

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<sup>1</sup> *Brooker v. Thomas Borthwick & Sons (Australasia) Ltd.* [1933] A. C. 669

<sup>2</sup> 99 L.J.P.C. 81, *Strickland v. Grima*, [1930] A.C. 285, Keith, *Journ. Comp. Leg.* xi. 289.

<sup>3</sup> Cf. Mulock, *Can. Bar Review*, xii. 406-16.

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XI. Canadian arbitrator in the case of the ship *I'm Alone* was not a judge, it could conclusively be explained that Mr. Lafleur had a reputation unequalled by any Canadian judge for legal knowledge. In the contest regarding the appeal from the Irish Free State it was effectively pointed out that the Supreme Court of the State was exceptionally weak in numbers, three in all, and that it would be very difficult seriously to assert that its members could dispassionately be compared favourably with the galaxy of legal talent which can be used to constitute a full division of the Privy Council to hear an important constitutional case when five judges sit.<sup>1</sup>

Various suggestions have been made to eliminate the difficulty. Lord Haldane suggested the creation of a single Imperial Court of Appeal representing the United Kingdom and the Dominions effectively, with the power to sit in divisions and the possibility of a division sitting in succession in various Dominion capitals. The proposal has never aroused any great attention either in the United Kingdom, where the intervention of Dominion judges in British appeals arouses no enthusiasm, or in the Dominions, which seem content to let matters stand, unless and until abolition is preferred. Canada meantime has encouraged the presence of her judges from time to time on the Council, and a Canadian judge sat on the important reference as to the right of the British Government to appoint a member of the Boundary Tribunal on the Irish boundary, in view of the refusal of the Government of Northern Ireland to nominate a member.

This power of reference is one of the semi-judicial functions of the Council which serves important ends. The King may refer to it any matter at his discretion, though of course

<sup>1</sup> Cf. Constitution of Eire, Art. 26 (2).

the Council might point out that the subject matter was not suited to such treatment. Under this power have been decided important boundary issues<sup>1</sup> such as that between Ontario and Manitoba,<sup>2</sup> and the contest between Canada and Newfoundland over Labrador.<sup>3</sup> The issue between the Legislative Council and the Assembly of Queensland as to the power of the former over money Bills was thus pronounced upon.<sup>4</sup> But the procedure is not available when the issue is one which properly could be made the subject of ordinary judicial proceedings, and the reference in the case of the question of the ownership of land in Southern Rhodesia<sup>5</sup> was made because the issues involved were emphatically such as no court could properly decide, involving *inter alia* the obligations of the Crown towards a chartered company when the latter claimed to have a right to reimbursement of expenditure on administration which had not been defrayed from local revenue, and to have acquired property in all ungranted lands by conquest or otherwise. A reference will be refused also if the advice given would not be effective, as when the Colonial Secretary in 1878 declined to refer to the Council the issue of the right of the Dominion Government to dismiss the Lieutenant-Governor of Quebec on the score that the Dominion Government would not be bound by the advice.

The question has naturally been raised,<sup>6</sup> arising out of

<sup>1</sup> So also the question of the composition of the Irish Boundary Tribunal in 1924. Cf. Parl. Paper, Cmd. 2214. Questions under the constitution of Northern Ireland can be referred to it under the Government of Ireland Act, 1920, by the local Government; see *Government of Ireland Act, 1920, Reference, In re [1936] A C 352*

<sup>2</sup> Ontario Sess. Paper, 1885, No. 8.

<sup>3</sup> 43 T.L.R. 289.

<sup>4</sup> Queensland Money Bills Case, April 3, 1886

<sup>5</sup> [1919] A.C. 211.

<sup>6</sup> Keith, *Imperial Unity and the Dominions*, pp. 165-166, so as regards the confiscatory legislation of Queensland in 1920, *War Government of the British Dominions*, pp. 260, 261.

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the power of reference, whether disputes between Governments might not be made the subject of disposal by the Privy Council. The issue became of serious consequence in 1914, when the illegal action of the Union Government in deporting agitators from the Union might have caused serious difficulty as between the British and the Dominion Governments. It was pointed out that, if the agitators had been foreign subjects, their Governments might have raised the issue of the legality of their expulsion, and as between parts of the Empire some mode of settlement of difficulties should apply. The project has finally taken shape in the conception of an Inter-Imperial Tribunal of a voluntary character to deal with justiciable disputes arising between the Governments, which has been described above.<sup>1</sup> The Privy Council, however, may remain for a considerable period the arbitrator of Canadian constitutional issues, which might continue to be brought to it even if appeals on ordinary points of law were, as they might well be, completely cut off.

(7) In this connection an interesting suggestion was made by Senator Casgrain, a typical representative of Quebec, on June 8, 1936,<sup>2</sup> when he proposed that the provinces should be asked to agree to make a judgment of the Supreme Court of Canada, when unanimous, final except in constitutional cases, thus cutting off any direct appeal from the provinces. He insisted that, where race and religion were concerned, an umpire outside the country was desirable. Otherwise he stressed the unfairness to poor litigants, denied that the appeal was an Imperial link, and—rather inconsistently—reproached the Privy Council with failing in certain cases to respect the rights of minorities, as in the Manitoba school case. On this point Mr. F. R. Scott in

<sup>1</sup> See pp. 137-41, *ante*.

<sup>2</sup> *J.P.E.*, 1936, pp. 757 ff.

1930<sup>1</sup> delivered a strong attack on the Privy Council, arguing that it denied<sup>2</sup> to the minority in Manitoba the protection for its religious rights in school matters which the Supreme Court had conceded in *Barrett v. Winnipeg*,<sup>3</sup> and that in the *Tiny Township Case*<sup>4</sup> the Privy Council had affirmed the view taken by the three Protestant judges of the Supreme Court, against their three Catholic confrères, that the Roman Catholics in Ontario had no right to have recognition in matters of higher education of the privileges admittedly theirs in regard to elementary education. But this case rather serves as an argument for the utility of an impartial court where there is a plain division on a religious issue, and the *Guibord Case*,<sup>5</sup> also referred to, where the Privy Council overruled the view of eight out of nine Quebec judges, and held that burial in consecrated ground must be permitted to a Catholic who had died when connected with a prohibited institution—the Liberal Institut Canadien—but who had not been excommunicated, must be treated as a strong argument in favour of an outside tribunal. That the Privy Council was right in that case is perfectly clear in law, and equally clear was the justice of its ruling as to the fact that certain religious impediments in Quebec to marriage were no part of the civil law of the province.<sup>6</sup>

Sir A. Aylesworth's reply to Senator Casgrain stressed the fact that the proposal contemplated an appeal as of right in cases where the Supreme Court was not unanimous, which would be a derogation from the rule established deliberately in 1875 cutting off any appeal as of right from

<sup>1</sup> *Queen's Quarterly*, Autumn 1930

<sup>2</sup> *City of Winnipeg v. Barrett*, [1892] A.C. 445

<sup>3</sup> 19 S.C.R. 374

<sup>4</sup> [1928] A.C. 362, [1927] S.C.R. 637.

<sup>5</sup> (1874), L.R. 6 P.C. 157

<sup>6</sup> *Despatie v. Tremblay*, [1921] 1 A.C. 702.

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the Supreme Court. He also denied—no doubt incorrectly—the power of any authority but Parliament to deal with the prerogative of the King in this matter. He denied accusations of political bias against the Privy Council, but asserted that in questions of constitutional character considerations of policy should have some weight; this view would cover the decision in *Edwards v. Attorney-General for Canada*<sup>1</sup> regarding the eligibility of women for the Senate, which on strict law seems frankly indefensible.

It is interesting to note the existence in Quebec itself of a movement against the maintenance of the appeal, significant of the growing consciousness of Quebec of the assured future of the French, whose birth-rate remains under Catholic teaching so high as to assure them immunity from any possible unfairness; indeed it has been suggested that Ontario may come to insist on the appeal as a guarantee that she shall not be subject to excessive pressure by French Canada. Mr. Lapointe on June 30, 1931,<sup>2</sup> insisted that the retention of the appeal, being voluntary since the Imperial Conference of 1926, was not an infringement on sovereignty, but held that it implied a reflection on the bar and bench of Canada to hold that the Supreme Court lacked the competence necessary to inspire confidence in Canadian litigants. Senator R. Dandurand, the Liberal leader in the Senate, is of like opinion, and a good deal of sympathy with that view exists in the ultra-Nationalist circles of Quebec.<sup>3</sup> But it is very far from being the case that Quebec opinion on the whole tends to this view. So far Quebec seems in the

<sup>1</sup> [1930] A.C. 124.

<sup>2</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, p. 263.

<sup>3</sup> It is complained that the canons of interpretation applied to the Quebec code are ill-suited to local jurisprudence. Mignault, *Univ. of Toronto Law Journal*, I. 104. Quebec also is not willing to obey the Dominion law as to divorce.

main to hold that the *status quo* as regards the British North America Acts and the appeal is the wiser course to follow.

) It must be noted that the abolition of the appeal from Canada would be far from easy, despite the fact that the Statute of Westminster, 1931, frees both the federation and the provinces from the restrictions of the Colonial laws Validity Act, 1865. The Dominion could no doubt make it impossible to bring appeals from the Supreme Court in virtue of the fact that that Court is its creation and can be dealt with effectively by it. But it could not control appeals from the provinces direct on all matters falling under provincial authority, which includes the constitution of civil courts. If, therefore, any province retained appeals, even if others abolished them, then the Privy Council would still have the opportunity of deciding issues, and there would be great inconvenience if the Supreme Court and other provincial courts were not prepared to follow the judgment of the Council. It may be noted that there has always existed *de facto*<sup>1</sup> and now *de jure* the possibility that a constitutional issue may be decided by the Supreme Court without the matter being brought under review by the Privy Council. That arose from two considerations: the extreme reluctance of the Privy Council to hear appeals from criminal causes, and its interpretation of that term in a sufficiently wide manner to cover issues of offences created under provincial laws. It might have been expected that such matters would have been regarded as civil by the Privy Council, since criminal law is, properly speaking, federal; but that has not been the case. Under, therefore, the system operative under the abolition of the criminal appeal in 1933 by Dominion Act, held valid in *British Coal Corporation v. The*

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<sup>1</sup> *Chung Chuck v. R.*, [1930] A.C. 244.

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XI. *King*,<sup>1</sup> the possibility of a decision being come to by the Privy Council on a constitutional issue may be cut off. A conflict might therefore arise if in some other proceeding the same issue were decided otherwise by the Privy Council, for there would be no compulsion on the Supreme Court in any criminal proceeding to follow the ruling, while, if the issue came before it in civil proceedings, there would be necessity to follow. But the likelihood of much difficulty may perhaps be doubted. It must be noted that the prohibition of appeal is not regarded as affecting the right of the Governor in Council to refer to the Supreme Court issues affecting criminal law, as in the reference as to Section 498A of the Criminal Code with a view to a final decision by the Privy Council.<sup>2</sup> It need only be added that the way might be laid open for the federation by free use of the criminal law power to effect indirectly many things which it cannot do directly, if it could find a Supreme Court majority willing to take this view.

In the case of the Privy Council and the Commonwealth of Australia the same difficulties in enhanced form would affect the abolition of the appeal, because the States have not so far received power to override Imperial legislation or to give their Acts extra-territorial validity. Thus appeals in all but constitutional issues involving the relations of the federation and States *inter se* or the States *inter se* cannot be affected by Australian legislation. It has, however, been suggested<sup>3</sup> that the Statute of Westminster, 1931, when adopted in the Commonwealth, may give power to the Commonwealth to abolish all appeals from the States not merely in matters of federal jurisdiction but also in matters

<sup>1</sup> [1935] A.C. 500.

<sup>2</sup> *A.-G. for British Columbia v. A.-G. for Canada* (1937), 106 L.J.P.C. 34, affirming [1936] S.C.R. 363.

<sup>3</sup> Cf. Dixon, *Aust. Law Journal*, x. Supp. p. 101.

of State jurisdiction. At present the federal Parliament cannot abolish, in the view of the Privy Council, the appeal from the State courts in matters of federal jurisdiction directly,<sup>1</sup> but only indirectly by excluding State courts from the exercise of such jurisdiction, which the constitution permits it to do, and which it has done as regards the hearing by State Supreme Courts of constitutional appeals in *inter se* cases. If the Statute of Westminster were adopted, it would no doubt be open to the Commonwealth to abolish the appeal in such causes from the States without forbidding them to deal with them, subject to appeal to the High Court, a procedure which might save some inconvenience.<sup>2</sup>

But there is no reason to suppose that as regards appeals in matters under State authority the Statute would give any power. It is certainly not intended to do so, for Section 9(1) plainly aims at preventing the Commonwealth dealing with any issue not already within its legislative ambit, and the wording seems adequate for that purpose; State appeals are matters within the authority of the States, and not within that of the Commonwealth, even if they are also subject to Imperial control. If the States so desired, they could doubtless obtain the withdrawal of the present Orders in Council regulating appeals, and obtain the full freedom to prescribe by Act their rules. If the State appeal is to be affected, it would have to be by reason of an amendment of the constitution of the Commonwealth with the approval of the State electorate. The alternative would be an Imperial Act, which would certainly not be passed except on requests

<sup>1</sup> *Webb v. Outram*, [1907] A.C. 81, *Nadan v. R.*, [1926] A.C. 482.

<sup>2</sup> At present a State Supreme Court can dispose of a case involving *inter se* issues if it can do so on another ground, *Drew, In re*, [1919] V.L.R. 600 *R v Maryborough Licensing Court* (1919), 27 C.L.R. 249.

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XI. from the Commonwealth Parliament and those of all of the States. Similar action would probably be the most convenient mode of procedure, if and when Canada and the provinces unite in desiring the end of the appeal.

In the case of the Union of South Africa, the rarity of appeals is marked. In *Whittaker v. Durban Corporation*<sup>1</sup> Lord Haldane stressed the fact that the constitution (s. 106) evidently deprecated appeals, and very few have been allowed; only in the *Pearl Assurance Co.'s Case*<sup>2</sup> has any feeling apparently been occasioned, for in *Ndobe's Case*, where there was a really important constitutional issue arising out of the Cape Native Franchise as it then stood, though the Privy Council gave leave to appeal, the appeal seems not to have been pursued for lack of funds, an interesting example of the restrictions on the value of the appeal.<sup>3</sup> In 1934 General Herzog refused to deal with the issue as an appeal was pending, and so in the Status of the Union Act, 1934,<sup>4</sup> the matter was left intact. In 1935 the Nationalists moved for the termination of the appeal, which even before the Statute of Westminster, 1931, was in the hands of the Parliament of the Union under Section 106 of the South Africa Act. The essential motive was one of status, and the chief reasons urged against change were simply that there was no real dissatisfaction with the appeal as operated; that it was valued by the English-speaking section of the people and its removal would be resented; that it would have to be retained for Southern Rhodesian causes, if appeal were to lie first to the Union; and that, if the Native Territories were to be transferred, the people there would demand retention of the appeal. It is clear that

<sup>1</sup> (1920), 90 L J P.C. 119.

<sup>2</sup> [1934] A.C. 571.

<sup>3</sup> [1930] A.D. 484; *J.P.E.*, 1935, pp. 692 ff., 894 ff.

<sup>4</sup> Section 10; Royal Executive Functions and Seals Act, 1934, s. 9.

its existence is entirely precarious, and, just as the appointment of a local Governor-General was insisted on for status reasons in 1937,<sup>1</sup> so for like reasons the appeal will have to go. It is not a matter of any substantive importance for the Union itself, but the position of the Native Territories differs. Presumably, Southern Rhodesia would insist on direct access to the Council.

There are strong reasons for holding that the criminal appeal from the Dominions, which has been abolished for Canada in 1933, should disappear in every case. The last instance of special interest is the effort in *Sodeman v. R.*<sup>2</sup> to obtain a ruling in favour of the doctrine that irresistible impulse as a ground for excusing a crime was part of the law of the Dominions. The Judicial Committee, in dismissing the petition for special leave, observed that, if it accepted the suggestion, it would be creating a difference between English and Dominion law, for the Court of Criminal Appeal had definitely laid it down in *R. v. Kopsch*<sup>3</sup> and *R. v. Flavell*<sup>4</sup> that that doctrine could not be accepted in England. The case had been before the Criminal Court at Melbourne, the Court of Criminal Appeal, and the High Court, and surely it is preposterous that three courts, and the right to ask for clemency, should not suffice. It must be remembered that in capital cases delay where execution is possible is unfair to the prisoner, or to the public if delay results in the grant of an undeserved reprieve. On other occasions the Privy Council has not hesitated to disagree with the Court of Criminal Appeal,<sup>5</sup> but it must be noted that the conditions in colonies or India<sup>6</sup> are not the same as

<sup>1</sup> Keith, *Journ Comp Leg* xix. 118.

<sup>2</sup> Discussed in *Austr. Law Journal*, x 3 ff.; 130 ff., 161 ff., (1936), 55 C L R. 192, *Sodeman v. R.*, [1936] W N. 190. <sup>3</sup> (1925), 19 Cr. App. R. 50.

<sup>4</sup> (1926), 19 Cr. App. R. 141.

<sup>5</sup> *R v Thomas*, [1933] 2 K.B. 489

<sup>6</sup> *Ras Behari Lal v. King Emperor* (1935), L.R. 60 Ind. App. 354.

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It is also open to doubt if the appeal need be maintained for cases involving (1) no constitutional issue, or (2) issue of the maintenance of uniformity of the common law, or (3) the interpretation of statutes adopted in the same form. It is useful to have the Sale of Goods Act interpreted generally as in *Grant v. Australian Knitting Mills Ltd.*<sup>1</sup> Nor is it undesirable to have the principles regulating judicial publicity so excellently expounded as in *McPherson v. McPherson*,<sup>2</sup> which incidentally is a high authority on the nature of a decree made absolute in divorce proceedings, though obtained in circumstances of improper privacy.

(8) The relations of the Free State and the Privy Council have, unhappily, proceeded on a very different basis from those between the Council and the other Dominions. It was unquestionably the intention of the British Government to secure the maintenance of the appeal, and it thought that by making Canada the model of Irish status the result was assuredly attained. Accordingly, when all mention of appeal was carefully omitted from the constitution as first presented, it was insisted that the appeal must be preserved and this was duly done in the constitution. It was, however, provided that the appeal would lie by special leave only from the Supreme Court, and that the Parliament might regulate appeals from the High Court to which the interpretation of the constitution is confided, but could not shut off the appeal in matters relating to the validity of any law. The British Government in effect permitted the exclusion of ordinary matters from appeal, but not the cutting-off of constitutional appeals, though the matter has been strangely misunderstood. At first the Privy Council showed

<sup>1</sup> [1936] A.C. 85.

<sup>2</sup> [1936] A.C. 177.

a marked reluctance to hear appeals, insisting<sup>1</sup> that it was normally the intention of the constitution that Irish decisions should be final; but in *Lynam v. Butler*,<sup>2</sup> an issue on the Irish land law, not of constitutional importance, it gave for no very clear reason leave to appeal. The Parliament then legislated to declare that the law as set out by the Supreme Court was the correct view, so that the appeal became useless and was dropped.

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This was followed by the decision of the Council in *Wigg and Cochrane v. Attorney-General of the Irish Free State*<sup>3</sup> that under Article 10 of the treaty of 1921 British Civil servants who retired in consequence of the change of Government were entitled to better terms than were conceded by the Irish Government, which adapted English usage to their cases. The judgment was based on statements of fact which in part proved erroneous, and the whole issue was reconsidered by the Council with the same result.<sup>4</sup> The arguments of the Council seem clearly sound in law, but it is clear also that the Article was not intended to have the legal effect which it turned out to imply. It would have been reasonable simply to legislate in both countries to give effect to the real intention, but the British Government, to the detriment of the unfortunate taxpayers, accepted the liability to refund to the Irish Government the excess payments due under the judgment, and the Free State, on this basis, agreed to pay the sums on certain conditions as to future retirements, which were formally accepted by both Governments and enacted by the two Parliaments as supplements to the treaty of 1921.

Finally, in 1930, an acute position arose in the case of the

<sup>1</sup> *Hull v. McKenna*, [1926] 1 R. 402

<sup>2</sup> [1925] 2 I.R. 231.

<sup>3</sup> [1927] A.C. 674

<sup>4</sup> [1929] A.C. 242; Keith, *Journ. Comp. Leg.* xi. 129-31, 256, 257.

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*Performing Right Society v. Bray Urban District Council.*<sup>1</sup>

The Council allowed the performance of music in which the Society claimed copyright under the British Copyright Act, 1911. The Supreme Court negated the claim on the score that the Copyright Act ceased to apply to the Free State when it became a Dominion under the treaty. This disclosed a complete lacuna in the Irish Law, revealing Ireland as failing to give protection under a copyright system which internationally certainly bound her,<sup>2</sup> and the Parliament in 1929 declared that copyright had existed during the period when the Supreme Court stated it was non-existent, but that no remedy was to lie for infringement prior to 1929. The injustice of this enactment was clear, and the only excuse for it was that under Article 43 of the constitution Parliament has no power to declare acts to be infringements of law which were not so at the date of their commission. Even if this section refers to civil law, and not as probable to criminal law,<sup>3</sup> it would of course have been simple to amend the constitution so as to do justice. In fact the Privy Council on appeal held that the Supreme Court was wrong, and that copyright had always existed; but it was precluded by the Act of Parliament from giving any remedy save that it could exonerate the unfortunate Society from payment of costs as ordered in the Supreme Court. The episode was deplorable, for it could have been prevented had the

<sup>1</sup> [1930] A.C. 377; in Supreme Court, [1928] I.R. 506; Keith, *Journ. Comp. Leg.* xii. 287-9, xiv. 108, 109. On June 20, 1932, the Council refused leave to appeal against the ruling of the Supreme Court that the State could reduce the pay of the police transferred under the constitution.

<sup>2</sup> In law the State is certainly bound by all British treaties up to 1921, though it has been contended that the State has a right to ask for freedom, and no doubt in most cases this could be arranged. The State was recognised as a distinct member of the Permanent Court. See Keith, *Journ. Comp. Leg.* xiv. 110, 111.

<sup>3</sup> As in the United States; Kerr, *Law of the Australian Constitution*, p. 33.

Supreme Court not made a palpable blunder, inflicting a grave wrong on an unpopular Society.

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The result was a complete divergence of view between the Free State and the British Government. But the Imperial Conference of 1930 could not dispose of the issue by simply recommending the dropping of the appeal, for a strong protest was made from the Protestant minority in Southern Ireland, which stressed its belief that the appeal was essential to preserve the rights in religious matters accorded by the treaty. The passing of the Statute of Westminster, however, as has been seen, rendered possible abolition of the appeal, but leaves the matter *in statu quo* as a matter of the justice of abolition, for the real question is whether the appeal is so implied in the treaty that it cannot be abolished without breach of that instrument. It may be, despite the opinion of the British Government to the contrary, that, even accepting the view that the treaty implied the appeal, the fact that the Statute of Westminster authorised the Parliament and legislatures of that Dominion to eliminate the appeal from the constitution would afford an excellent reason for assuming that the Free State under the treaty itself, which gives it the status of Canada, acquired by the increase of Canadian power an increase of corresponding character in her own power.

The case<sup>1</sup> in which the issue was decided was very interesting, and, but for the abolition of the appeal, it is perhaps not unnatural that special leave should have been given. It concerned the claim that a several right of fishery existed in the river Erne, despite the fact that Magna Carta forbids the grant of such rights in tidal waters. Many points

<sup>1</sup> *Moore v. A.-G.*, [1934] L.R. 44; Keith, *Journ. Comp. Leg.* xvii. 121, 122. It appears from *Little v Cooper*, [1937] I.R. 1 that the river Moy is in a different position.

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XI. were involved: the effect of Magna Carta which seems not fully to have been recognised in England until the decision in *Malcolmson v. O'Dea*<sup>1</sup> in 1863; the date of the introduction of English law into Donegal; and the extent of the power of a conqueror, if English law had not been introduced, to make such a grant, despite its deviation from English legal principles of a general bearing.<sup>2</sup> Further, there was involved the question of the interpretation to be placed on subsequent statutes which had long been read as confirming the rights enjoyed. But when the question of the right to grant leave to appeal arose, that this was impossible was accepted by the Privy Council,<sup>3</sup> though the Free State Government ignored the proceedings, and the court had to receive such aid alone as could be obtained from the arguments in the contemporaneous Canadian case, *British Coal Corporation v. The King*,<sup>4</sup> and those of the Attorney-General as *amicus curiae* rather than as representing the official views of the British Government.

(9) The prerogative of mercy at one time formed the subject of considerable friction between the British and colonial Governments. But it was soon realised that, if the theory of responsible government were not to be rendered untenable, it must be admitted that a local ministry was the proper authority to control the prerogative. In the case of Canada the contest was carried on by Mr Blake, who succeeded in persuading the Colonial Secretary that it would suffice if the Governor-General were required to exercise discretion, after hearing ministerial advice, in any case in which the grant of a pardon or reprieve might directly affect the interests of the Empire or of any place outside

<sup>1</sup> 10 H.L.C. 593.

<sup>2</sup> *Campbell v. Hall* (1774), 1 Cowp. 204.

<sup>3</sup> [1935] A.C. 484.

<sup>4</sup> [1935] A.C. 500.

Canada.<sup>1</sup> In 1888 the resignation of the Government of Queensland on the refusal of the Governor to accept the argument that the exercise of the prerogative should be based on their advice, and the inability of the Governor to find a ministry to take its place,<sup>2</sup> showed that the principle of independent discretion was untenable; and in 1892 the Colonial Secretary was finally persuaded to abandon the instruction that the Governor should exercise a personal discretion by the argument of the Governor of New Zealand, who pointed out that in fact the Governor had no option but to act on advice, and that the responsibility was one which ministers should face. Hence for New Zealand and the Australasian colonies, now States, the Canadian principle was adopted. It was accepted by the Commonwealth as proper. But Newfoundland was left with the old rule of discretion in the case of capital sentences enjoyed by the instructions, and it was only under Sir W. Macgregor (1904–9) that in practice ministers began to take any responsibility for the prerogative, which in effect the Governor had been allowed to exercise, an invidious position explained by the difficulties felt by ministers in a tiny community in resisting appeals for clemency for friends and supporters in politics.

In the case of the Union the question of the feeling which might arise in cases involving natives resulted in the adoption of the rule<sup>3</sup> requiring in capital cases personal discretion to be exercised after consideration of the question in Executive Council. The Governor-General must, however, if he reject the advice of the majority of members, enter the grounds of his dissent in the minutes. The procedure, it is clear, is incompatible with the modern view of responsible

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<sup>1</sup> Royal Instructions, Oct. 5, 1878, cl v.

<sup>2</sup> Keith, *Responsible Government in the Dominions* (1928), u 1114

<sup>3</sup> Royal Instructions, Dec 29, 1909, cl. ix.

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government, and no doubt in the Dominions and States the rule may be taken in effect to be that the ministry controls, though the principle of 1878 is still retained in the new instructions issued for Canada in 1931.<sup>1</sup> One omission, however, has been made; the British Government at one time discouraged the grant of pardons conditional on exile unless the crime was one of a political character unaccompanied by violence; but any limitation of this kind is obviously a matter for local views, and it is now left to the Governor-General to act on any advice the ministry tenders.

Advice in matters of pardon is normally given by one minister, the Minister of Justice or Attorney-General, but capital cases are brought before the Cabinet in most cases. In accordance with British practice efforts have been made, not always successful, to prevent Parliamentary discussion of the use of the prerogative<sup>2</sup> on the broad ground that its exercise is essentially a matter for executive discretion with full knowledge of all the facts and not for party recriminations in the legislature. It is, however, inevitable in small communities that much pressure should be exerted on members by constituents and by members on ministries.

In the case of Canada it was originally the intention of the British Government that the prerogative should be restricted to the Governor-General, even in respect of provincial cases of violation of regulations made by the legis-

<sup>1</sup> Royal Instructions, March 23, 1931, cl. v.

<sup>2</sup> For a curious case discussed by reason of the terms of the New South Wales Crimes Act, 1900, s. 430 (1), which allows a judge in case of murder merely to record the sentence, thus suggesting that execution is unlikely, see *Austr. Law Journal*, x. 1 f. For a Victorian case where a sentence was respite to allow an appeal to the Privy Council, see *ibid.* x. 3 ff., *Sodeman v. R.*, [1936] W.N. 190. It has been ruled in Canada that a pardon cannot be refused, even if given in order to secure deportation, *In re Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] 2 D.L.R. 348; *In re Veregin*, *ibid.* 362; 41 Man. R. 306.

latures. But, since it was determined that the legislatures could confer the pardoning power on the Lieutenant-Governors, the exercise of the prerogative in respect of these matters is manifestly inappropriate, and the delegation of it disappeared in 1905. In the case also of the Commonwealth and the States the division of authority manifestly should be that the Governor-General should pardon for offences against Commonwealth laws and the State Governors for offences against State laws, including the criminal law. In general the power has been delegated to pardon persons condemned in the Dominion for offences committed outside them, but triable therein by reason of the admiralty jurisdiction of their courts, and in any case a pardon given would not be questioned in the Dominion.

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To grant an amnesty is clearly now a matter of ministerial discretion, and it rests with Parliaments to decide how far convictions of treason or other crime are to be treated as disqualifications for office or membership of Parliament. A generous treatment has had to be accorded to persons convicted of high treason in the Union whose offences have been remitted by Union Act.<sup>1</sup>

Apart from the right of pardon of actual offences, it is always open to a Dominion Government to refrain from prosecution and to stay proceedings on non-governmental prosecutions by entering a *nolle prosequi*, which, as in England, bars further action and is a matter entirely within ministerial discretion.

The power to pardon before conviction is expressly given in the case of accomplices who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if there are more than one. The same result, of course, can more simply be obtained by

<sup>1</sup> The latest is the Nationalisation and Amnesty Act, 1932 (No. 14).

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(10) In all the Dominions in increasing degree is found the practice of entrusting judicial or quasi-judicial functions to bodies of an administrative character. The extent to which the exercise of such functions is subject to judicial control varies greatly. The most serious functions are those ascribed to Immigration Boards of various kinds, for they endeavour more or less energetically to evade all judicial control, though not with complete success. In the Union of South Africa the matter is carried to the extreme extent by forbidding any judicial intervention except upon a question of law raised by a Board, which excludes any effort of the courts to interfere.<sup>1</sup> In Canada<sup>2</sup> and in Australia<sup>3</sup> cases of immigrants continually present difficulties, but the courts are not prepared to acquiesce in exclusion from protecting persons affected against unfair treatment. In special they will intervene to prevent immigration officials treating as immigrants persons born in the Dominion in conditions which render their entry there not an act of immigration at all.

In many other matters decisions must inevitably be left to expert officers. Under the Mines and Works Act, 1911, of the Union an inspector is permitted to try offences in breach of regulations, or rules made by the manager and approved by the minister, and may impose fines to be recovered by deduction from wages; an appeal is permitted only to the magistrate of the district, whose decision is

<sup>1</sup> *Union Govt. v. Fakir*, [1923] A.D. 466; *Narainsamy v. Principal Immigration Officer*, [1923] A.D. 673.

<sup>2</sup> Cf. *Wade v. Egan* (1935), 64 Can. C.C. 21.

<sup>3</sup> *Potter v. Minahan* (1908), 7 C.L.R. 277, *Ex parte Kisch* (1934), 52 C.L.R. 221; *Griffin v. Wilson* (1935), 52 C.L.R. 260; *Ex parte Freer* (1936), 56 C.L.R. 381.

final. Compensation for miners' phthisis is decided upon by an expert board. Where technical issues are involved it is essential to give such powers. The exercise of these powers is subject to the same principles as in England. The authority to deal with matters semi-judicially must be clear<sup>1</sup> if the jurisdiction of the ordinary courts is to be ousted, and there must be exact compliance with its terms; if a charge against a Civil servant is to be investigated by the head of a department, it will not suffice that a subordinate carries it out,<sup>2</sup> and, if the minister is to be satisfied of certain facts regarding an immigrant, then it is not enough that an immigration officer should hold the view.<sup>3</sup> This accords, of course, with the judicial rule that authority must be exercised by a judge personally and cannot be deputed by him to anyone else except under clear statutory authority. Nor will the courts readily assume that judicial functions will be entrusted to a single person without appeal; hence<sup>4</sup> a regulation of the Governor-General in Council providing that no jeweller's permit may be issued unless the commissioner of police certified that the applicant was a fit and proper person to hold a permit was ruled invalid, because it gave absolutely to one person a remarkable power, and presumably therefore went further than could be assumed to be within the ambit of the power to make regulations given to the executive.

Administrative tribunals must not act unreasonably, capriciously, or in bad faith; hence licensing courts are, as in England, held strictly to justice.<sup>5</sup> But, though failure to give reasons for decisions may be relevant in considering

<sup>1</sup> *R. v. Padsha*, [1923] A D 281.

<sup>2</sup> *Guildford v. Minister of Railways and Harbours*, [1920] C.P.D. 606.

<sup>3</sup> *Shadiack v. Union Government*, [1912] A D. 642.

<sup>4</sup> *Keen v. Commissioner of Police*, [1914] T P D. 398

<sup>5</sup> *Garrett v. Albany Licensing Court*, [1918] E.D.L. 128.

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whether a tribunal has acted fairly, the giving of reasons is not compulsory any more than in England.<sup>1</sup> There must, however, be afforded an opportunity to the person concerned to state his case, and to correct any relevant statement to his prejudice brought before the tribunal.<sup>2</sup> But tribunals are not bound to follow the ordinary rules of evidence, for it is part of their function to bring to the consideration of the issues involved their own knowledge and experience. Least of all, of course, are they compelled to take only oral evidence.<sup>3</sup> Strong opinions have, however, been expressed that there is real danger of injustice arising from failure to observe the English rules of evidence, representing as they do a crystallisation of experience not lightly to be rejected.<sup>4</sup>

Parliamentary action varies as to the issue of giving judicial control over the operations of these tribunals. Thus in New South Wales, the Supreme Court has been deprived of power to grant prohibition, certiorari or like orders interfering with certain decisions as to industrial arbitration, the fixing of fair rents, workmen's compensation, and liquor licensing.<sup>5</sup> Like efforts by the federal Parliament to restrain action by the High Court have failed, because the constitution does not permit the Parliament to deprive the High Court of the power to decide whether under the constitution the Court of Conciliation

<sup>1</sup> *Jaffer v. Parow Village Board*, [1920] C.P.D. 267; *Stewart v. Witwatersrand Licensing Court*, [1914] T.P.D. 178; *Debrincait, Ex parte; Milk Board, In re* (1934), 34 S.R. (N.S.W.) 581, 590

<sup>2</sup> *De Vertueil v. Knaggs*, [1918] A.C. 579; *Ross's Case*, [1920] T.P.D. 1.

<sup>3</sup> *Fernandez v. South African Railways and Harbours*, [1926] A.D. 60. They need not allow legal representation: *Dalner v. South African Railways*, [1920] A.D. 583.

<sup>4</sup> Judge Stephens (*Administrative Tribunals and the Rules of Evidence*) cited by Evatt, *Can Bar Review*, xv 260, *R v. War Pensions Entitlement Appeal Tribunal* (1933), 50 C.L.R. 228, 256.

Evatt, *op. cit.* 259

and Arbitration is exercising a legal power or not.<sup>1</sup> On the other hand the Victorian legislation, which gives a Transport Regulation Board the power to grant licences for the operation of commercial vehicles, provides that an appeal shall lie on points of law, and on this score the Supreme Court and on appeal the High Court<sup>2</sup> had to rule that the Board had gone beyond the relevant considerations in basing a decision on the deficit in the accounts of the State railways.

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While some degree of protection thus exists from the courts, it is extremely limited, for they have no power to make men who have quasi-judicial decisions to pronounce of judicial temperament or sound judgment. They can compel an officer who has issues to determine to act honestly and without regard to plainly improper motives, but they cannot control his opinion,<sup>3</sup> and substitute their own conclusions based on the facts.<sup>4</sup>

<sup>1</sup> *Caledonian Collieries Ltd. v. Australasian Coal, etc. Federation* (1930), 42 C L R 527

<sup>2</sup> *Victorian Railway Commrs v. McCartney* (1935), 52 C L.R. 383.

<sup>3</sup> *Shadiack v. Union Government*, [1912] A.D. 642.

<sup>4</sup> *Doyle v Shenker*, [1915] A.D. 233; *Hawken v. Miners' Phthisis Board*, [1920] W.L.D. 93. See Kennedy and Schlosberg, *South African Constitution*, p. 416.

## CHAPTER XII

### THE FEDERATIONS—ORIGIN AND STRUCTURE

Chapter XII. THE Canadian and Australian federations are indebted essentially to the United States for the main features of their constitutions. But the circumstances of their origin have caused both of them to deviate greatly from their model, and that in different directions.

(1) It was inevitable that the presence of the United States in immediate vicinity to Canada and in constant contact should have suggested from the outset the desirability of federation. But in the United States federation was brought about only by external pressure, and for a prolonged period there were no reasons sufficient to induce co-operation on the northern side of the frontier. The British Government itself, by dividing New Brunswick and Prince Edward Island from Nova Scotia, and by severing Quebec into Upper and Lower Canada in 1791, seemed eager to rule by division. Though Lord Durham was at one time attracted by the ideal of a federal Canada, practical considerations made him drop the project, for which the maritime provinces were unripe, and concentrate instead on the preliminary of turning a reunited Canada into a true English province. The time for that, however, was over, and it was the absolute impossibility of continuing to carry on effective government in the united province that afforded the dominant motive for federation. Canadian politics after 1858 rapidly approached a deadlock; the growing dis-

proportion of population made the equal number of members for each part of the province an intolerable anomaly, while change would menace the swamping of French nationality in Canada. The solution lay in a federation in which French Canada could enjoy autonomy in local matters, while no longer hampering national policies. Skilled diplomacy secured the concurrence of the maritime provinces, which had themselves planned a measure of union, as was suggested by the homogeneity of their population and their common interests. The causes which induced these provinces to concur in federation and which strengthened Canada in her desire to attain it were varied. The growth of a great power on the southern border, animated, through causes partly not connected with Canada, by feelings of something approaching hostility to the British provinces, invited attention to the defenceless position of the country. The British Government felt that the defence of the provinces when disunited offered a burden impossible to sustain, and pressed for adequate local action. Considerations of safety therefore impelled men's minds to some form of union, and unquestionably the presence of Fenians on the border operated powerfully in 1866 in inducing New Brunswick to acquiesce in federation. A further motive was due also to the hostility of the United States. The reciprocity treaty of 1854 had opened up an era of prosperity for Canada, and the denunciation of the compact by the United States menaced the province with commercial stagnation. It became urgent therefore to obtain access to the markets of the maritime provinces, and to abolish the tariff barriers between them. A further economic factor was furnished by the efforts of British and Canadian companies and financiers interested in railway development to secure the possibility of the opening up of railway communication with the

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maritime provinces on the one hand, and the west on the other. Only thus could it be hoped to secure sufficient additional traffic to make the many lines already constructed or contracted for in Canada itself a paying proposition. Much less important was the realisation of some men of insight, such as George Brown, that it was vital for Canada to secure the west before it should be occupied by American immigrants and the possibility of retaining it under British control, despite the boundary treaty of 1849, pass away. There were other grounds which could be urged for federation, but these were the vital matters, which overcame reluctance in North America, and induced the British Government, which had long been indifferent, to accept the project with alacrity and to use all its influence to bring it to successful fruition.

In the case of Australia there were lacking the essential arguments to induce federation. Four of the colonies, New South Wales, Tasmania, Victoria, and Queensland, had once formed a unit; they had prospered by division, and each soon acquired a distinctive standpoint which it was reluctant to surrender. South Australia has been from the first absolutely independent and free from the convict strain; Western Australia was equally distinct, though it later succumbed to the fascination of cheap convict labour and was the last in 1868 to surrender the privilege. Had they been isolated communities without a common source of support in the shape of the United Kingdom, they might easily have been driven to unite for protection; but, as it was, the well-meant efforts of Lord Grey in 1849–50 to insert federal clauses in the constitution then granted as a preparation for self-government were bitterly criticised. Gradually the advantage of federation became visible, strengthened of course by the coming into being of the

Canadian federation. External danger counted for comparatively little, though as early as 1870 the Franco-German war had evoked in Victoria thoughts of neutrality. The tension with Russia in 1877-8 and 1886 counted for something, Germany's advent in New Guinea in 1884 and France in the New Hebrides for more, still more the defeat of China by Japan in 1894; but the more practical foreign issue was that of the exclusion of Chinese and Japanese immigrants, and with that went the exclusion of British Indians. Defence would be more effective, British experts reported, if there was federation, and the pious belief prevailed that it might even be cheaper. Economic issues loomed much larger. It would be excellent to abolish all customs barriers and to create within the new unit freedom of trade with protection against the rest of the world. The substitution of one great community for six weaker bodies would bring a great impetus to trade and commerce. Money could be borrowed more cheaply on federal security, and the Australians were prodigious borrowers. The war of railway rates on the frontiers of the colonies by which each sought to secure business for itself at the expense of its neighbours would be ended. The disputes over the use of the river Murray for irrigation and navigation would become capable of solution. The divergence of legislation on a multitude of commercial and industrial topics would be ended with all that meant in the interests of business. The problem of old-age pensions could be solved by a federation. Enthusiasts promised the regulation of trade disputes on a uniform basis in place of conflicting decisions in each colony on issues which were common to the whole of Australia. Others, too sanguine, thought that the federation might dispose of the lands which the colonies had been unable to develop and to take over the vast northern territory which South Australia

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nominally owned. Lawyers suggested that the establishment of federation would facilitate the settlement of legal disputes without the cost of a reference home, and would bring about assimilation of the interpretation of laws in the several jurisdictions.

But, beside this long list of arguments of an economic character, there was present in the movement the growing sense of nationality. It alone in the long run really prevailed over obstacles and secured the establishment of the federation. The British Government was throughout sympathetic, but the time had passed when it could have exercised any decisive influence on the course of events, as it undoubtedly had done in the case of Canada. It served, however, a useful purpose in securing the accession of Western Australia to the federation, though it may be feared that the State now regrets its decision. This sense of national destiny had been injured by the refusal of the British Government in 1883 to secure New Guinea for Australia and to prevent the establishment of France in the New Hebrides, and this had something to do with the energy with which in some quarters stress was laid on the necessity of the Australian colonies freeing themselves from a position in which they could not successfully make representations to the United Kingdom on issues of vital importance to them, but of negligible interest to a Government which had no eyes save for the spectacle of European affairs. This element of critical hostility had no counterpart in the Canadian and maritime province attitude in 1864-7.

(2) So different were the circumstances that the methods of achieving federation inevitably differed in essentials. The Canadian federation was produced largely in secrecy, and was the work of a number of determined individuals who carried with them the people rather than were guided

by their wishes. The initial step was taken in 1864 by a coalition, including men who had never hitherto seriously desired federation but who had realised that deadlock in Canada was complete and could not be solved by ordinary means. The statesmen of the maritime provinces, whom they met at Charlottetown and invited to Quebec, had no mandates from their legislatures or peoples for federation. The Quebec resolutions were accepted by Canada alone; neither in Nova Scotia nor New Brunswick were they formally agreed to. Nova Scotia was never allowed to express the views of the people, the legislature assuming power to act without a dissolution. In New Brunswick a dissolution in 1865 gave a majority to the opponents of federation, but the new Government mismanaged the position, and a change of opinion was achieved which allowed New Brunswick to send her delegates to settle with those of Nova Scotia and Canada the details of the constitution. That instrument was thus finally determined upon at London, and enacted by the Imperial Parliament in 1867 in a form which was not in detail that approved in Canada. Nova Scotia now had to be allowed an election, and it repudiated by its vote federation; but relief was denied by the British Government and Parliament alike, and it sullenly acquiesced. After that no chance of change remained. British Columbia in 1871 and Prince Edward Island in 1873 accepted federation on the basis of the existing constitution; the other three provinces, Manitoba (1870) and Saskatchewan and Alberta (1905), were created by the Dominion from the enormous areas under the administration of the Hudson's Bay Company which passed to it in 1869-70. Moreover, the federal Act itself created Ontario and Quebec as distinct provinces out of Canada, and before it took effect constitutions of the two provinces were settled upon

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by the Parliament of the united province. There was therefore a minimum of free determination in the whole proceeding as far as the people were concerned.

In the case of Australia federation was the outcome of a movement which in its later stages was far more popular than governmental. No doubt it was due to governmental action that a Conference of delegates from the colonies in 1884 adumbrated a measure to secure a degree of co-operation which was passed in 1885 as the Federal Council of Australasia Act, and which, though utterly defective, did something to accustom Australians to common action on a legal basis. Ministers again attended the Melbourne Conference of 1890, which led to the selection of delegates to frame at Sydney in 1891 a draft constitution. But after that ministerial energy languished and the driving power passed to the people, among whom enthusiasts promoted federation leagues and kindred bodies, and the *Sydney Bulletin* set about its task of educating the back-blocks to the necessity of a united Australia by the use of arguments intelligible and striking, if often crude and misleading. It was this popular movement which drove ministers to meet at Hobart in 1895, and to agree to legislate for the selection, not by Parliament but by popular vote, of delegates to a Convention at Adelaide at 1897. The work of this Convention in 1897–8 proved decisive. The constitution was referred as agreed upon to the people; New South Wales failed to give the necessary size of majority, but it was placated by concessions made by a Premiers' Conference in 1899; fresh referenda accorded acceptance of the changes, and the Bill was then passed in 1900 by the British Parliament virtually in the form in which it had been approved in Australia, Western Australia deciding at the last moment, partly on a hint that it might be necessary to divide the colony and

allow the gold-fields a free choice, to refer the question of acceptance to the people, with a decisive result. The people, therefore, supplied in large measure the driving power to achieve the goal; moreover it was by the people that the constitution, after the fullest exposition by its supporters and critics, was deliberately and decisively ratified in every colony.

(3) In both cases the federal structure in essentials bears similarity to that of the United States, which was essentially the chosen model. It shares with it the characteristics of being set out in a written instrument, in providing for the supremacy of the constitution over the governments and legislatures, in dividing power between a central and local authorities, and in assigning to the courts the duty of defining the measure of authority to be exercised by the federation and its members. But in very important matters both constitutions depart from the United States model, and in certain matters the Australian constitution adheres more closely to the United States precedent than does the Canadian. The cause of this is unquestioned. Canadian federation grew up under the shadow of the great conflict between North and South in America. The danger to a federation of the undefined powers of the States was manifest, and the fathers of federation for that reason were determined not to repeat the error made in the framing of the American constitution. Moreover, some of them, including Sir John Macdonald, were at heart supporters of union, and, while they perforce yielded to the necessity of a confederation as the only means to please Quebec and to make up for the lack of local institutions of government in the maritime provinces, they were anxious to limit as closely as possible the degree of autonomy of the parts. In the case of Australia no such motive was effective. The

colonies were autonomous, and the effort to bring them into federation meant serious surrender of authority. It was therefore necessary to omit from the federal pact all that savoured of undue centralisation.

Both constitutions differ from the United States constitution in the greater detail which they contain. They differ also in the vital fact that they make no provision for the rights of the subject. They were prepared by men who were not afraid of Parliamentary despotism, and did not see, as perhaps they should have seen, that legislatures are capable of infringing the moral law. The fact that sanctity of contracts and due process of law are required of American State legislation, and not of the legislation of the provinces, explains the many differences between the judicial interpretation of the two systems. Thirdly, the federations presuppose the existence of responsible government, while the United States constitution negates it. In the United States ministers may not sit in the legislature; in Canada and Australia they cannot in effect be ministers unless they so sit. Similarly the head of the federations is a representative of the Crown who acts as constitutional monarch, as opposed to an elected President who actually governs and whose ministers are his instruments and subordinates with whom at pleasure he can dispense. So also the head of the Government has in practice no veto on legislation as has the President, for it is not he but ministers who govern, and Parliament is in accord with their views. Fourthly, the States of the United States had been independent States before they federated, and they preserve as a result a wider measure of authority than is allotted to the States of Australia, and still more than is given to the Canadian provinces. It is significant that the Australian States can delegate powers to the federal Parliament, implying a rela-

tion foreign to the conceptions of the United States. Finally, the scheme of judicature shows essential differences. The States in America were not prepared to submit the judgments of their State courts to alteration by any federal court, and therefore on all State issues these courts are supreme, and, if an issue of this kind falls to be decided incidentally in a federal court, it normally will follow State decisions. In both Canada and Australia one aim of federation was to secure unanimity of decision on points of law, and appeals lie to the Supreme Court and the High Court respectively from the local courts on purely local issues involving no federal element. Again, the United States demands a separation of jurisdictions, so that federal courts administer federal law and State courts State law. In the British federations, though in different ways, jurisdiction can be exercised in federal matters by State or provincial courts.

From the Canadian constitution that of the Commonwealth differs in form in the important particular that, as it was necessary to separate Canada into two provinces, the British North America Act, 1867, makes provision for the constitutions of Ontario and Quebec. Moreover, Manitoba, Saskatchewan, and Alberta were given constitutions by Dominion Act. On the other hand, the Commonwealth constitution leaves the States to enjoy their own constitutions subject to the federal scheme. The Canadian provinces, however, have power to amend their constitutions despite the grant by the Act of 1867 and federal legislation. Secondly, the appointment of the head of the State rests in Australia with the King, and the States are in direct relations with the British Government; their Agents-General are accredited to the Dominions Office. In Canada the Lieutenant-Governor is appointed by the Dominion Government, which

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can remove him, though the power is not used for federal ends, as it might have been. Thirdly, the Australian Senate is in structure based on the equality of the States and on election by the people, a device now adopted by the United States. Canada departs from the federal principle both by the unequal treatment of the several provinces and by the method of appointment by the Dominion Government. Fourthly, the States in Australia, like those in the United States, retain all the powers not expressly denied to them and can exercise them concurrently with the Commonwealth, though subordinate to Commonwealth legislation in such cases as are also within Commonwealth jurisdiction. In Canada the residuary jurisdiction rests with the Dominion, but judicial interpretation has greatly restricted the force of this rule. Fifthly, the power to disallow provincial Acts is given to the Dominion Government, and it was long used to protect Dominion interests, though its use is now largely in abeyance. In the Commonwealth State Acts can be disallowed only by the King, and there is no instance on record in which disallowance, which indeed is almost obsolete, has been expressed on the wishes of the Commonwealth. Sixthly, the Canadian federation authorises the creation of federal courts, but assumes that, unless deprived of jurisdiction, the provincial courts are competent to deal with all federal questions. The Commonwealth constitution provides for the exercise of federal jurisdiction by federal courts, and for the assignment to State courts of federal jurisdiction.

(4) The intention of Sir J. Macdonald was as far as possible to reduce the status of the provinces to that of local government authorities. This explains the deliberate determination to prevent appointment of the Lieutenant-Governors by the Crown. They would then be deemed to have a delega-

tion of the royal prerogative, while, if appointed by the Governor-General on the advice of his ministers, they would be servants of the federal Government. Similarly the legislatures were to be under control; their Bills were to be subject to reservation on Dominion instructions, and it was early determined that, in exercising the power to disallow, the Governor-General was to act on Dominion advice. As the Crown was not to be really present as part of the legislature, their competence would virtually be that of local government bodies. Access to the British Government was entirely denied, and representations from provincial governments need not be forwarded to London unless it pleases the Dominion.

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But, while the Lieutenant-Governor and the legislature are thus in a sense placed under Dominion control, the courts soon dispelled the idea that the provinces were mere local government instrumentalities. The Dominion sought to deny the power of the legislatures to empower the Lieutenant-Governors to create Queen's Counsel and award them precedence in the courts; it denied that they could provide for alteration of the seals of the province; it denied that they could authorise the remission by the Lieutenant-Governors of fines and imprisonment imposed for breach of provincial legislation. On all these points the courts held them wrong. Again, on the same view that the prerogative was not (unless by special enactment of the British North America Act) applicable to the provinces, the Dominion claimed that escheats of land passed to it, but the Privy Council in *Attorney-General of Ontario v. Mercer*<sup>1</sup> negated that view, and in *Maritime Bank of Canada v. Receiver-General of New Brunswick*<sup>2</sup> it asserted that the

<sup>1</sup> (1883), 8 App. Cas. 767. See also p. 213, above.

<sup>2</sup> [1892] A.C. 437.

Chapter XII. priority of the Crown in bankruptcy applied to the province. In the same way the Privy Council has established the most important doctrine that the land in each province is so vested in the King that, if Indian tribes are induced by the Dominion Government, which has charge over them, to surrender their claims in return for annuities, the land vests in the province, not the Dominion, and the annuities cannot be recovered by the Dominion, unless of course the Dominion has had the good sense to secure an agreement from the province to pay for the rendition to it of the beneficial control of former Indian reserves.<sup>1</sup> In the same way the legislatures have been allowed by the Privy Council<sup>2</sup> to assume such privileges as they deemed necessary, although Sir J. Macdonald contended that bodies of their limited scope and position had no right to treat themselves as entitled to rights belonging only to a true Parliament.

As a Dominion officer the position of Lieutenant-Governor is withheld from provincial power of constitutional change; but that does not mean that the provinces cannot confer upon him new powers, such as the right to appoint deputies. What it means is that the provinces cannot legislate so that a Bill can be passed by the initiative or otherwise without being submitted to him for the royal assent.<sup>3</sup>

The position of the Lieutenant-Governor as representative of the Crown was thus shown to be very different from that of the chief officer of a local institution, and the Dominion Government has refrained from any effort to make use of him as a means of controlling policy, save in so far as on occasion advice can be given to him as regards

<sup>1</sup> *A.-G. for Dominion of Canada v. A.-G. for Ontario*, [1897] A.C. 199; *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637.

<sup>2</sup> *Fielding v. Thomas*, [1896] A.C. 600.

<sup>3</sup> *Initiative and Referendum Act, In re*, [1919] A.C. 935.

representations to be made as to Bills likely to inconvenience the central authority. But such issues are normally dealt with direct between ministers, federal and provincial. Nor, despite their selection by the Dominion Government, have Lieutenant-Governors normally abused their office to effect political aims. When they have been suspected of such action they have been removed by the federal ministry, as in the cases of Mr. Letellier de St. Just in Quebec in 1879, and Mr. McInnes in British Columbia in 1900. For all practical purposes the Lieutenant-Governor is now expected to act as a constitutional sovereign, and in this respect the Dominion differs in reality very slightly from the Commonwealth, where the Governors are directly appointed by the Crown.

The provinces, however, are subject to disallowance of legislation by the Dominion, but this issue, which has played a considerable part in Canadian history, has now diminished in importance, as the practice has been reduced to minimal proportions. Sir J. Macdonald and Conservatives in general were not reluctant to disallow Bills deemed to be unconstitutional as arrogating to the provinces powers they did not possess, and Acts have been disallowed because they conflicted with Imperial interests as restricting immigration of Orientals, or with Dominion obligations, as was the case in 1908 with a British Columbia Act denying to Japanese the privilege of entry given by Canadian Act. Mr. Aylesworth, when Minister of Justice, approved in 1909-10 the disallowance of Acts which extended wrongly, in his opinion, the competence of provincial companies to act outside the province, a view which was afterwards proved erroneous by the decision of the Privy Council in *Bonanza Creek Gold Mining Co. v. The King*.<sup>1</sup> But, unlike the Conservatives,

<sup>1</sup> [1922] 1 A.C. 566.

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the Liberals normally declined to interfere with Acts merely because they were unjust or even confiscatory of private property without due compensation. This was Mr. Aylesworth's attitude in the famous Cobalt case and the Hydro-Electric Commission case in 1909, both instances where the legislature took upon itself to dispose of private rights in a manner which many held inequitable.<sup>1</sup> Mr. Doherty in the Conservative Government from 1912 was less opposed to disallowance on this ground, and a British Columbia Act of 1917 as to the rights of Vancouver Island settlers was disallowed in 1918<sup>2</sup> because it ran counter to a contract in which the Dominion had a share. But the Conservatives did not hesitate to denounce in 1923 the next case of disallowance on moral grounds,<sup>3</sup> that of a Nova Scotia Act of 1921 determining as to the disposition of certain property contrary to a ruling of the Supreme Court of the Dominion. Perhaps too much stress has been laid on this case, which was that of a private member's Bill which the local government evidently was not particularly pleased to see passed, so that its opposition to disallowance was no more than formal. Everything, however, points to the conclusion that disallowance has now become an instrument which is rarely used to decide constitutional issues between the provinces and the Dominion. In 1924 a Mineral Taxation Act of Alberta was disallowed. It imposed an acreage tax, and in default of payment it vested in the Crown in the right of the province the lands affected. This was deemed too drastic, and it might also be deemed to raise a right as to final

<sup>1</sup> "The prohibition 'Thou shalt not steal' has no legal validity upon the sovereign body"; *Florence Mining Co. v. Cobalt Lake Mining Co.* (1908), 18 O.L.R. 275, 279, *per* Riddell, J.

<sup>2</sup> *Prov. Leg. 1896-1920*, u. 704 ff.

<sup>3</sup> The Oriental Orders in Council Validation Act 1921, of British Columbia, had been disallowed (March 31, 1922) as violating Japanese rights under the treaty of 1913

ownership of the land, which by that date had not been transferred, as it was in 1930, to the province. Since then Alberta has become the scene of very energetic legislation under the auspices of the Social Credit Government of Mr. Aberhart, intended to reduce the burden of debts to farmers and others and give them less interest to pay and extended periods for payment. In part this legislation has been ruled invalid by the courts as trenching on the federal sphere of control of interest, but appeals for disallowance have also freely been made on the score that the action of the province was lowering the prestige of the Dominion as a whole. The Dominion Government, however, was reluctant to proceed to disallowance, on the no doubt sound ground that nothing should be done to encourage accusations of invading provincial rights, and thus provoking a conflict on constitutional grounds which might obscure the real issue.

On August 17, 1937, however, disallowance was intimated of three Acts to control banking by a licensing system under which they might be compelled to provide credit at government discretion, and forbidding the questioning in the courts of the validity of provincial legislation without governmental sanction, on the score that the Acts invaded the federal sphere of jurisdiction,<sup>1</sup> conflicted with federal laws, and supplanted federal institutions designed to facilitate the trade and commerce of the whole Dominion, and forbade access to the courts to determine their validity. The Albertan Government denied the right to disallow, and the legislature passed Bills to control the press, to control the banks, and to tax the banks, no doubt with a view to destroy their normal operation. On October 5 the Lieutenant-Governor withheld assent pending instructions

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<sup>1</sup> This covers currency, banking, paper money, interest and legal tender (s 91).

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from Ottawa, and the federal Government announced that the federal Supreme Court would be asked to pass judgment on the right of disallowance, which plainly exists. On November 1 the Supreme Court of Alberta declared invalid both the Act of April 1937 reducing by fifty per cent the interest on bonds guaranteed by the Government and that purporting to forbid the challenge of the former Act in the courts. The Bill to provide for accurate news and information compelled the press to insert governmental propaganda and gave such statements privilege; it is significant in October criminal proceedings for libel were brought against certain protagonists of social credit. Though the attack on freedom of the press went beyond all precedent, it should be noted that the federal Government had not disallowed the Communist Propaganda Act, 1937, of Quebec, a measure asserted to be due to clerical influence, and certainly open to the charge of being destructive of freedom of speech and writing and of giving very dangerous powers to the Government to close buildings and confiscate writings advocating communism.

The Government also refused to consider disallowance of the drastic legislation<sup>1</sup> by which the Liberal Government of Ontario cancelled certain contracts in respect of electric power which it deemed injurious to the province. The matter was ultimately settled, more or less amicably, by a compromise advantageous to the Government, but probably not seriously unjust to those concerned. There can be little doubt that much imprudence had been shown by the Conservative administration, which, like most Governments, had become liable to corrupting influences with the long possession of office and freedom from effective criticism.

<sup>1</sup> Hydro-Electric Power Commission Act, 1935; *J.P.E.*, 1935, p. 862; 1936, p. 299; 1937, p. 356.

In foreign affairs the subordination of the provinces to the Dominion is in all probability on the executive side complete, though not yet definitely asserted by the Privy Council. But legislative power has formed the subject of much consideration by that tribunal and the Supreme Court. The British North America Act, 1867, by Section 132, gave to Canada authority both executive and legislative, so far as necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising from treaties between the Empire and such foreign countries. This provision was clearly adequate so long as Canada was party to treaties made by the Crown under the old procedure. So it was held, though the matter did not come before the courts, that Canada could legislate to give effect to the Boundary Waters treaty with the United States even though such legislation must impinge on the provincial control of property and civil rights and local matters. It was also held by the courts<sup>1</sup> that, if Canada legislated to give effect to a treaty with Japan, that legislation overrode any contrary provisions of British Columbia which limited the employment of Japanese, though as against Chinese such legislation might be valid. Again, the Manitoban legislation as to game could not stand against the terms of the Migratory Birds Convention with the United States of 1916 when given effect by federal Act.<sup>2</sup>

But the new status of Canada raised difficulties, for it could hardly be said that Canada was acting as a part of the British Empire when procedure under the Labour organisation system of the peace treaties was concerned. In these cases draft conventions, when arrived at by the Conference,

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<sup>1</sup> *A.-G. for British Columbia v. A.-G. for Canada*, [1924] A.C. 203.

<sup>2</sup> *The King v. Stuart*, [1925] 1 D.L.R. 12.

Chapter XII. are sent to each member for action, which involves submission within eighteen months to the authority responsible for approval. It was clear that the position in Canada was doubtful, and in the *Legislative Jurisdiction over Hours of Labour Reference*<sup>1</sup> the Supreme Court laid it down very naturally that the obligation on Canada as a federal power was to submit draft conventions to the provinces, which had the power to legislate, and that it was not appropriate for Canada to accept the conventions and, on the score of acceptance, claim legislative authority over the subject matter, though it was given to the provinces.

Two decisions, however, altered current views on the subject. The first, on the *Regulation and Control of Aeronautics in Canada*,<sup>2</sup> arose out of the Aviation Convention of 1919, which like the peace treaties took the form of a treaty by the British Empire, with separate delegates for the Dominions, but without limitation of the authority of the British delegates. It was held that Section 132 amply justified anything done to give effect to the convention overriding provincial rights. But it was added that legislation for treaty matters fell within federal control generally, thus extending the effect of the decision, in itself not open to doubt. A new situation, however, was revealed by the decision regarding *Radio Communication in Canada*.<sup>3</sup> The terms of Section 132 could not there be invoked, for there was no longer an Empire treaty, the International Radiotelegraph Convention of 1927 being signed separately for Canada as a distinct unit and not as associated with the Empire in a general convention. This point, however, was not found a serious difficulty by the Privy Council, for it fell back on the general power to legislate for the peace, order, and good government of Canada, as well as the fact

<sup>1</sup> [1925] S.C.R. 505.

<sup>2</sup> [1932] A.C. 54.

<sup>3</sup> [1932] A.C. 304.

that communications between the provinces and the outside world were expressly placed by Section 92 (10) under federal control. Even the claim of the provinces that, if transmission were federal, reception might be provincial was disallowed, no doubt conveniently. But, apart from this, the Council certainly conveyed the impression that it took the view that anything regarding which Canada made a treaty for the Dominion as a whole became *ipso facto* a matter of general interest on which legislative power accrued to the federation.

The conclusion that Canada could thus invade the provincial sphere under the plan of concluding treaties on matters provincial and then legislating to give them effect, did not at first secure action by the federation, for it was felt that in matters effectively provincial that course, however legal, would really be a distinct departure from the plan of federation, with its full respect for the rights of the provinces which might be wholly destroyed if, for instance, the federation could, by making a treaty banning religious education, overthrow the system of such education in Quebec. There was much to be said for this point of view, and it was probably unfortunate that it was departed from.

The economic *débâcle* of 1929 and the following years, however, resulted in a fundamental change of outlook, under the influence of President Roosevelt's New Deal. Mr. Bennett decided to take advantage of what seemed to be the Privy Council's view that, where a treaty was made, it was proper for Canada to legislate even over the heads of the provinces, and a series of Acts were duly passed on this basis which made serious inroads on the provincial sphere. These Acts were very properly referred by the Government for advisory opinions by the Supreme Court,<sup>1</sup>

<sup>1</sup> [1936] S.C.R. 363-538 gives the whole batch of Acts discussed.

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and thence they proceeded as usual for final decision to the Privy Council.<sup>1</sup> That body explained away its supposed view as to legislation for treaty obligations in a manner ingenious and satisfactory. The decision in the *Aeronautics Case*<sup>2</sup> was held to rest on Section 132 of the constitution and as resting on an Empire treaty, while the general observation as to legislation must be ruled as *obiter*. In the *Radio Case*<sup>3</sup> the decision was found to rest on the essential fact that the subject matter of the statute fell neither within federal nor provincial power expressly, though a part thereof—broadcasting—was akin to interprovincial telegraphs, which was federal. It therefore fell under the general residuary power of the federation. It follows therefore that, where subjects are provincial and treaties are to be made,<sup>4</sup> the legislation must be provincial, and the treaties should be accepted only if provincial legislation will be forthcoming. In fact, of course, the procedure of the Labour Organisation of the League is completely in point, for it allows the provinces to decide on submission of the draft Conventions if they will accept them. It is true, however, that apparently this means that one province can prevent acceptance of the treaty for Canada by refusing to accept, since it is plainly undesirable, even if possible, to make a convention binding on certain provinces only, and would be an innovation in Canadian federalism.

On these principles the Privy Council ruled invalid the Weekly Rest in Industrial Undertakings Act, 1935, the Minimum Wages Act, 1935, and the Limitation of Hours of

<sup>1</sup> *A.-G. for Canada v. A.-G. for Ontario* (1937), 53 T.L.R. 325, [1937] A.C. 326, Keith, *Journ. Comp. Leg.* xix. 274-6, *Can. Bar Review*, xv. 428-35.

<sup>2</sup> [1932] A.C. 54.

<sup>3</sup> [1932] A.C. 304.

<sup>4</sup> It is held by some authorities that Canada can invade the provincial sphere by concluding a formal treaty in the name of the King, though for Canada only (Cahan, *J.P.E.*, 1937, pp. 571-3), but the Council clearly denies the constitutionality and apparently the legality of such legislation.

Work Act, 1935, all of which were based on the power of legislation alleged to have been secured by ratification in March and April 1935 after approval by both Houses of Parliament of draft conventions of 1921, 1928, and 1919 respectively. An effort was naturally made to defend the Acts under the general power on the plea that the matters concerned had reached such dimensions as to affect the body-politic, and to have ceased to be merely local or personal, and to have become matters of national concern. But the Judicial Committee refused to accept anything but wholly abnormal conditions such as some extraordinary peril to the material life of Canada, or epidemic of pestilence, as justifying the overriding of the specific powers of the provinces.

The treaty power to make treaties for the provinces was called in question by the provinces in the argument in these cases, but was not formally passed upon by the Judicial Committee. It may, however, be taken as certain that it must exist. The Crown, acting on the advice of the Imperial Government, had full power to bind the provinces before confederation, and the exercise of that power by the federation seems implicit in the existence of the federation.

(5) The States of Australia enjoy the right of direct appointment of their Governors by the Crown, their laws are subject only to the almost obsolete control of the British Government, with which they communicate direct through their Governors or Agents-General in London. No question has ever arisen of the issue of the prerogative being effective in the State as a source of authority, but there has been a controversy of importance regarding the extent to which the States have any standing in issues of foreign affairs. The Adelaide Convention deliberately decided not to accept the suggestion that the Governor-General should be the channel

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of correspondence with the Governors, so that it was left to the British Government in 1902 to rule that, where any representation was made by a foreign Government regarding matters affecting a State, the British Government could proceed to investigate the issue through the Governor-General. The ruling was evoked by the complaint of the Dutch Government that South Australia had failed to arrest the seamen of the ship *Vondel*,<sup>1</sup> as the State was bound to do under the Anglo-Dutch Treaty. The State repelled the contention, urging that it alone possessed the necessary power to execute the treaty and should be approached direct, while the Commonwealth and Mr. Chamberlain argued that the Commonwealth for all external issues must be treated as a unit. The matter remained in principle undecided in the sense that, while the British Government could insist on acting through the Commonwealth, or with the advice of the Commonwealth, on issues raised by the States, e.g. of unfair treatment of their citizens, the actual means of carrying out treaty obligations might rest with the States alone. The power of the Commonwealth to deal with external affairs by legislation was formerly by most legal advisers not held to extend to the enforcement of treaties on subjects affecting the States. It was necessary, therefore, to secure State legislation for acceptance of conventions falling in their sphere, or as in the case of aviation, to induce the States to confer, as they can do, under the constitution legislative power on the Commonwealth. Similarly the recognition of Consuls was deemed a matter on which States and Commonwealth must concur, and the Commonwealth could regulate such issues as the landing of armed seamen from foreign men-of-war only with State concurrence.

<sup>1</sup> Keith, *Responsible Government in the Dominions* (ed. 1912), i. 790-804.

From time to time, however, hints were given by justices that a wider view of the power to deal with external affairs might be taken. Thus in *Roche v. Kronheimer*<sup>1</sup> it was pointed out by Higgins, J., that the validity of the Treaty of Peace Act might be based upon it as fitly as upon the defence power. But in the *Aviation Case*<sup>2</sup> in 1936 the issue was fully examined. Though the States had been asked to legislate to give powers as to aviation to the federation, only Tasmania had done so effectively, and the federal Air Navigation Act, 1920, had therefore to rely on federal authority for its value. Only late in 1936 was it tested when a pilot appealed from a conviction for a breach of the regulations made under the Act by which he required a licence to fly in New South Wales. The regulations in question, though intended to effect the purposes of the International Convention for the Regulation of Aerial Navigation of 1919, did not accord precisely with the provisions of the Convention. The justices ruled that the conviction could not be upheld, but their grounds were not identical. It, however, is clear that "external affairs" is very wide, and covers all relations with the outside world, including the rest of the Empire. But how far does it authorise invasion of the affairs which normally are of State authority? Latham, C.J., Starke and Dixon, JJ., were vague on this head, while Evatt and McTiernan, JJ., who represent the Labour point of view, insisted that anything could properly be dealt with on which a treaty could be made, including the suppression of traffic in drugs, the control of armaments, and the regulation of labour conditions. If this is true, then of course the Commonwealth is not a federation like Canada, to which Article 405 of the

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<sup>1</sup> (1921), 29 C.L.R. 329.

<sup>2</sup> *R. v. Burgess; Henry, Ex parte*; 55 C.L.R. 608; *Austr. Law Journ.* x. 297.

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Treaty of Versailles refers, and it can alter its complete outlook as to treaty-making in State affairs. But there is a grave difficulty, for the last-named justices naturally insisted that the Acts passed must exactly follow out the Convention, and that deviation was fatal, as in the case in question. The other justices were less exigent in demanding full conformity, but only Starke, J., held that the regulations were consistent with the Convention. It thus turned out that aviation confined to one State could be dealt with by the federation only under the power of external affairs to the extent to which there was a Convention and it was exactly followed. In inter-State and external aviation the right to deal with aviation as a whole follows, no doubt, from the trade and commerce power where the external affairs or defence power is not available.

There is no doubt of the great importance which this ruling may have for the future of the Commonwealth. But the fact remains that the power is not very convenient, for two reasons. Firstly, it is probable that treaties may not accord wholly with Australian conditions, so that the treaty power may prove unsuited as a basis of legislation. Secondly, there are serious dangers in the use of a power of this sort to interfere in the conduct of any subject matter by the States. The division of authority over subjects may be inevitable, but there is always difficulty in one authority stepping in partially and imperfectly without having complete responsibility. One of the genuine defects of federal government is the loss of efficiency through the inability of any Government to adopt a coherent plan for the whole of governmental activities, and another is the friction engendered by the duplication of authority.

It is not surprising, therefore, that the Commonwealth

decided that the new power was not satisfactory and asked at the referendum of March 6, 1937, for full power over aviation. But only Queensland and Victoria turned out to be favourable,<sup>1</sup> and the project therefore failed to be carried. The result is surprising in so far as it is clear that one control is desirable, and that it should have occurred is probably in part due to the issue being submitted contemporaneously with the very controversial proposal to allow the federation to control marketing, discussed below. Broadcasting, on the other hand, has been effectively claimed as federal in *R. v. Brislan; Williams, Ex parte*<sup>2</sup> as essentially a form of telegraphy, the number of recipients being irrelevant.

In internal affairs, on the other hand, the Imperial Government from the first claimed that for purposes of Conferences it must treat Australia as a unit, and, despite protests, the States have no representation at the Imperial Conference. Issues affecting them therefore cannot here effectively be discussed<sup>3</sup> and correspondence has to be resorted to, e.g. as regards migration and settlement. The disadvantages of this position are obvious enough, but they are unavoidable, though in such a case it would probably have been wiser, when the question of activity in an emigration policy was taken up by the British Government after the war, to have convened a special Conference where the Commonwealth and the State Governments would have planned together to work out a scheme involving their joint responsibility. As it was, the arrangements under the subsidy system embodied in the Empire Settlement Act,

<sup>1</sup> The total vote was 1,924,946 for, 1,669,062 against, but four States had an adverse majority, for the Marketing Bill the figures were, 1,259,808 for, 2,214,388 against, and all States against.

<sup>2</sup> (1935), 54 C.L.R. 262 Dixon, J., dissented on the score that the broadcasting element made a fundamental change.

<sup>3</sup> Cf. Chapter XXI (4), *post*.

Chapter XII. 1922,<sup>1</sup> were made with the States only through the Commonwealth by correspondence, and in the final result matters were badly mismanaged. The Victorian settlement scheme, under contract with the federation, in particular proved far from effective. Great hardships were inflicted on the settlers, and the large sums of money which represented the British contribution towards settlement were mainly wasted. Only by dint of the most energetic pressure exerted direct and through the Commonwealth on the State was some slight compensation obtained for the unfortunate emigrants,<sup>2</sup> whose treatment has necessarily involved the whole question of emigration to Australia in much difficulty.

The issue of the Statute of Westminster raised naturally considerable dissent on the part of the States whose Governments felt that matters vitally concerning them should not and could not properly be disposed of behind their backs. There was force in their attitude, for two matters dealt with at the Conferences immediately affected them, the doctrine of repugnancy and that of territorial limitation of legislative power. If the former were relaxed, they might find the Commonwealth armed with power to remodel the constitution without the safeguard of the referendum and the saving of State authority involved in the constitution, Section 128. As regards territorial extension of law, as they controlled the criminal law, and as it was in that sphere that difficulties had in the main arisen, they desired to secure any extra authority conceded. In special they were wholly opposed to the suggestion made by some jurists that the grant of extra-territorial power to the Commonwealth would mean that the Commonwealth could legislate on any topic

<sup>1</sup> Continued with reduction of expenditure by half to £1,500,000 a year in 1937, see *J.P.E.*, 1937, pp. 58-65.

<sup>2</sup> British Migrants Agreement Act, 1933; the wrong done was candidly admitted: *J.P.E.*, 1934, pp. 129-31.

whatever, so long as it did not deal with State territorial limits. Their dissent caused the federal Government to make concessions. In the result, therefore, the Statute contained special clauses to meet their wishes. It was made clear that no power to alter the constitution otherwise than by the means provided therein was conceded,<sup>1</sup> that the legislative power of the Commonwealth remained confined to the topics assigned by the constitution; and that Imperial legislation for the States should not be subject to the request and consent of the Commonwealth Parliament as in the case of legislation for matters in the Commonwealth sphere.<sup>2</sup> Even so, the States were not wholly mollified and the Commonwealth Government, without binding itself not to bring the Statute into operation without State concurrence, definitely promised that it would consider itself under the obligation that, before it in fact legislated to put the Statute into operation for the Commonwealth, it would hold a Conference with the States. This was done in substance in 1936 before legislation was introduced in 1937. The States too still retain the right to make recommendations for honours, though the Governor-General of the Commonwealth has been consulted by the British Government before these recommendations are dealt with.

In internal affairs there has been a conflict of judicial opinion<sup>3</sup> in Australia, whether it is proper or not to speak of the sovereignty of the States, but the issue seems of minor importance. What is clear is that the Crown in the Commonwealth and the Crown in the States are different aspects, and thus it has been ruled by the High Court that legislation by the Commonwealth Parliament may be ex-

<sup>1</sup> 22 Geo. V., c. 4, s. 9.

<sup>2</sup> *Ibid.* s. 10.

<sup>3</sup> *Commonwealth v. New South Wales* (1923), 32 C.L.R. 200.

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The Crown in the Commonwealth and in the State are so distinct that one can sue the other not merely in contract, but also even against its will in tort under the constitution (Section 75), as when a State vessel inflicts injury on a Commonwealth vessel.<sup>5</sup>

Powers under Imperial Acts must be exercised by the Governor-General or Governor of a State, according as they fall within the sphere given to the Commonwealth or not. Thus the Governor of a State is the proper authority to act

<sup>1</sup> *R. v. Sutton* (1908), 5 C.L.R. 789.

<sup>2</sup> *Pirrie v. McFarlane* (1925), 36 C.L.R. 170.

<sup>3</sup> *Engineers' Case* (1920), 28 C.L.R. 129

<sup>4</sup> See p. 217, *ante*.

<sup>5</sup> *Commonwealth v. New South Wales* (1923), 32 C.L.R. 200. The Crown is not to be regarded as several juristic persons; *Commonwealth v. Colonial Combing, etc., Co.* (1922), 31 C.L.R. 421, 439, *Engineers' Case* (1920), 28 C.L.R. 129, 152; and pp. 147, 148, *ante*.

under the Fugitive Offenders Act, 1881,<sup>1</sup> for on that head the Commonwealth has not authority, and the Governor would be the person to sanction proceedings against foreigners under the Territorial Waters Jurisdiction Act, 1878. But the position is questioned, and it is true that the issue is far from wholly clear, because in *McArthur v. Williams*<sup>2</sup> the High Court was inclined to take a generous view of the position of the Commonwealth as a single unit, holding for example that under the Fugitive Offenders Act, 1881, an accusation of committing an offence under the law of the Commonwealth included the laws of the States, and not merely charges under Commonwealth legislative enactments. The same issue arises, as already noted, in the case of admiralty jurisdiction, and the justices discussed, without deciding, the question of the continued existence of the jurisdiction of the State courts despite that vested in the High Court as a federal court.<sup>3</sup> The difficulties are inevitable, because the constitution of the Commonwealth is of an unexpected type which accords badly with the existing definitions of the British Interpretation Act. The Commonwealth view in that case has the special interest that it disagreed with that held by the New Zealand courts.<sup>4</sup>

(6) In the judicial arrangements of the federations the distinction between them comes out clearly. The Commonwealth insists on attempting to distinguish judicial from executive and legislative power, vesting the three in the courts, the Crown, and Parliament. The result of this determination is inconvenient, for judicial power by Section 71 of the constitution can be vested only in courts, either federal courts created by the Parliament or other courts,

<sup>1</sup> *McKelvey v. Meagher* (1906), 4 C.L.R. 265.

<sup>2</sup> *McArthur v. Williams* (1936), 55 C.L.R. 324.

<sup>3</sup> *Ibid* 359-61.

<sup>4</sup> *Munro and Campbell, In re*, [1935] N.Z.L.R. 159; *Munro, In re*, [1935] N.Z.L.R. 271.

Chapter XII. and in federal courts the justices must hold office subject to removal only on address from both houses of Parliament on the ground of proved misbehaviour or incapacity. It follows, therefore, that, if any body is given judicial power and has not such tenure of office, the grant is invalid. Thus the Inter-State Commission Act, 1912, which gave that body power to issue injunctions, was ruled invalid<sup>1</sup> because the members had only a seven-years tenure of office, so that the Commission was allowed to expire by lapse of time and has not been reappointed. Similarly, as the President of the Commonwealth Court of Conciliation and Arbitration had a like tenure, it was ruled that the Court could not enforce its own awards by judicial remedies.<sup>2</sup> The issue was much discussed in regard to the tribunal set up to aid the Federal Commissioner of Taxation in determining income tax. Was this a tribunal, so that its assessments were invalid, because its members were not holding office by judicial tenure? In one form it was held to be such a tribunal and so unable validly to make assessments, but by altering its functions to those of a Board of Review it was found possible, in *Shell Co. of Australia v. Federal Commissioner*,<sup>3</sup> to hold that it was not a court, and so could make valid determinations. The Privy Council held that a tribunal was not necessarily a court in the strict sense because its decisions were final, nor because it heard witnesses on oath, nor because two contending parties appeared before it whose rights it had to decide, nor because it gave decisions affecting the rights of subjects, nor because its findings were subject to appeal, nor because a matter had been referred

<sup>1</sup> *New South Wales v. Commonwealth* (1915), 20 C.L.R. 54.

<sup>2</sup> *Waterside Workers' Federation v. J. W. Alexander Ltd* (1918), 25 C.L.R. 34.

<sup>3</sup> [1931] A.C. 275. Contrast *British Imperial Oil Co. v. Federal Commr. of Taxation* (1925), 35 C.L.R. 422.

to it by another body. The Council ruled also that it was impossible to establish a real court unless the members held by the true judicial tenure. The restriction can be got rid of only by a constitutional amendment, a fact which illustrates effectively the difficulty of too great rigidity in constitutions.

The constitution again has been invoked successfully to negative the power of the High Court to give advisory judgments, on the score that this is not an exercise of judicial authority.<sup>1</sup> There must be contrasted the greater freedom under the Canadian constitution, where the Privy Council<sup>2</sup> has held that advisory judgments are possible, a view which is natural seeing that the Council itself may be called upon by the Crown to give such a judgment. The value of the procedure is very great, for it enables a broad issue to be determined without the chance of the judgment resting on a technical or minor point. The question of radiotelegraphy jurisdiction, for instance, was thus decided on a reference by the Governor-General of the issue to the court, and all the great constitutional issues of 1936–7 were thus referred by the federal Government. No doubt sometimes it is impossible to answer effectively too vague or complex issues, but the total absence of the power in Australia is inconvenient.

The British North America Act, 1867, gave to Canada by Section 101 the power to establish a general court of appeal for Canada and other courts for the administration of the laws of Canada. It left otherwise federal matters as well as provincial in the hands of the courts in the provinces, to which were assigned, by Section 92 (14), the control of civil and criminal courts and civil procedure, while criminal law and procedure are assigned to the federation. Canada has

<sup>1</sup> *Judiciary Act, In re* (1921), 29 C L R 257.

<sup>2</sup> *A.-G. for Ontario v. A.-G. for Canada* [1912] A.C. 571.

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established a court of appeal in the Supreme Court, and an Exchequer court which has jurisdiction in claims against the Crown which might be brought by petition of right in England,<sup>1</sup> in matters of patents and copyright, and in admiralty under the Admiralty Act, 1934. The jurisdiction of the Supreme Court is subject to appeal by special leave to the Privy Council both in civil and, until 1933, in criminal cases, for the effort of the Canadian Parliament to bar the appeal in the latter case, in view of the objections to such delays as occurred in *Riel's Case*,<sup>2</sup> was pronounced invalid in *Nadan v. R.*<sup>3</sup> The Council, however, does not in such cases grant leave to appeal, and the appeal was abolished after the Statute of Westminster, 1931, in 1933. But in civil cases, especially those affecting the constitution, the Council is the final arbitrator. Cases can also be taken direct from the provincial courts to the Privy Council either by special leave or as of right, but the Council prefers<sup>4</sup> that, when possible, the views of the Supreme Court should be ascertained before it rules finally on constitutional questions. But this tendency must be read subject to the fact that, where an appeal is taken by the unsuccessful party in the provincial court to the Supreme Court, and he is there defeated, it will be difficult to persuade the Council to grant leave to appeal. It is otherwise if the application for leave to appeal is made by the party successful in the provincial court but unsuccessful before the Supreme Court.<sup>5</sup>

A distinctive feature of the Canadian constitution gives

<sup>1</sup> No appeal lies from a refusal of the Governor-General to fiat a petition of right. *Lovibond v. Governor-General*, [1930] A.C. 717. Such an action is not a judgment.

<sup>2</sup> (1885), 10 App. Cas. 675.

<sup>3</sup> [1926] A.C. 482.

<sup>4</sup> *Initiative and Referendum Act, In re*, [1919] A.C. 935, 939.

<sup>5</sup> *Clergue v. Murray*, [1903] A.C. 521. A similar rule applies to Australia: *Victorian Railway Comrs v. Brown*, 3 C.L.R. 1132.

to the federal Government the appointment of the superior, district, and county court judges of each province, except those of the courts of probate in Nova Scotia and New Brunswick.<sup>1</sup> Further, until the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick are made uniform—an ideal<sup>2</sup> contemplated at the time of federation but never attempted and now out of the question—the judges must be selected from the local bars, a rule observed regularly in all the provinces, though theoretically only necessary for Quebec with its distinctive legal system. This power of the federation has at times caused friction with the provinces, which have the right of providing for judicial organisation, but the federal authority is plainly paramount and efforts to evade it seem to have ceased of late years. The one constitutional point which still arises is that occasionally of the grant to inferior courts by the provinces of powers which can properly only be exercised by Superior Courts. Thus a court which is to have power to award alimony must have a judge appointed by the Governor-General.<sup>3</sup>

In the Commonwealth before the passing of the Judiciary Act, 1903, jurisdiction in federal as well as State business was necessarily exercised by the State courts. Since the passing of that Act the State courts act as grantees of federal jurisdiction by the Parliament under the constitution. The grant of federal jurisdiction is wide, and the chief exceptions from State authority to act are in regard to matters arising directly under any treaty; suits between two States; suits between the Commonwealth and a State or a State and the

<sup>1</sup> British North America Act, 1867, s. 96. All salaries, pensions, etc. are dealt with federally, s. 100.

<sup>2</sup> *Ibid.* s. 94.

<sup>3</sup> *Kazakewich v. Kazakewich*, [1936] 3 W.W.R. 699, cf. [1937] S.C.R. 427, *Martineau & Sons Ltd. v. Montreal City*, [1932] A.C. 113.

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Commonwealth; and cases in which a writ of mandamus or prohibition is asked for against a federal official. Suits by a private person against a State may be brought in a State court or the High Court, and the States may deal with suits by claimants against the Commonwealth both in contract and tort. The position of the Commonwealth is safeguarded by the right of appeal from State decisions, and by the restriction of the exercise of federal jurisdiction in its lower grades to specially qualified magistrates.

There is, however, a further limitation to State power in the fact that State Supreme Courts cannot exercise jurisdiction in matters, other than trials of indictable offences, involving any question arising as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the constitutional powers *inter se* of any two or more States. In any such question the issue stands automatically transferred to the High Court for decision. This provision marks in 1907 the termination of the conflict of authority between the Privy Council and the High Court, arising from the fact that appeals lay from State courts to the Privy Council direct as well as to the High Court. The High Court ruled that the States could not tax official salaries of the Commonwealth as this might interfere with a federal instrumentality;<sup>1</sup> the Privy Council, on appeal from the Supreme Court of Victoria, held that this view was unsound,<sup>2</sup> the High Court<sup>3</sup> refused to follow the ruling of the Privy Council, in reliance on the fact that in the type of constitutional cases set out above the constitution, Section 74, excludes appeal to the Council unless on a certificate of the High Court. If this certificate were

<sup>1</sup> *Deakin v. Webb* (1904), 1 C.L.R. 585

<sup>2</sup> *Webb v. Outram*, [1907] A.C. 81.

<sup>3</sup> *Baxter v. Commissioners of Taxation* (1907), 4 C.L.R. 1087.

refused,<sup>1</sup> the High Court held that its decision should be final, and it refused to certify the case.<sup>2</sup> The way out lay in the right given by the constitution to the Parliament to define to what extent the federal jurisdiction of the High Court should be independent of that of any State court, and the legislature provided in 1907 for the automatic removal to the High Court of all cases of the type described. There can be little doubt that the enactment was valid, and in any case the issue became of no practical consequence, as the Parliament proceeded to permit the States to levy income tax at the normal rates on federal salaries.

The result of this legislation has been that the High Court decides all such constitutional issues without possibility of reference to the Privy Council. It remains, however, for that body to decide in each case whether or not there is a conflict of rights between Commonwealth and States or State and State. Thus it has ruled<sup>3</sup> that no such issue is involved in the question of the interpretation of Section 92 of the constitution providing for absolute freedom of trade between the States, for, if the section applies to the States only, no conflict arises, nor, even if it applies to the Commonwealth also, can there be any conflict as to rights *inter se*.

The matters in which original jurisdiction is federal are provided for by the constitution. They include those mentioned above, any questions affecting consuls or other foreign representatives; claims between residents of different States, or a State and a resident of another State. Moreover

<sup>1</sup> The Privy Council refused to allow appeal. See *Flint v. Webb*, 4 C.L.R. 1178, [1908] A.C. 214.

<sup>2</sup> In one case only has a certificate been given. *A-G for the Commonwealth v. Colonial Sugar Refining Co. Ltd.*, [1914] A.C. 237, and the decision was unexpected.

<sup>3</sup> *James v. Cowan*, [1932], A.C. 542. Cf. *Nelson, Ex parte*, (No. 2) (1929), 42 C.L.R. 258, 262. For the final decision see [1936] A.C. 578 discussed below.

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Parliament may confer jurisdiction in any matter arising under the constitution, or as to its interpretation, or under laws of the Parliament, or as to admiralty jurisdiction, or as regards subject matters claimed under the laws of more than one State—and wide use has been made of this power. It has also exercised the power to give rights of proceeding against the Commonwealth or the States in contract and tort<sup>1</sup> on issues within the judicial power. This limitation excludes, it may be noted, political issues proper, but a State may secure a judgment as to its boundary line as against another State.<sup>2</sup> Moreover the Parliament has power, which it has exercised, to facilitate the serving and execution of process by one court in one State throughout other parts of the Commonwealth.

(7) The financial clauses were among those which most vexed the framers of the constitutions, and nearly prevented agreement. The difficulty was that, with the grant of sole power of raising Customs to the federation, the local governments would be without the necessary means of carrying out their functions, since direct taxation is always most difficult to raise in young communities. Hence it was necessary to provide for subsidies, in addition to taking over most of the debts of the provinces which entered the federation in 1867. They were at the same time granted by Section 107 of the constitution their lands, mines, minerals, royalties, etc.; other governmental property was duly divided between the federal and provincial governments. Terms were arranged on the creation of the other units. British Columbia surrendered certain lands intended to be used to purchase the construction of the inter-colonial line to connect east and west, the surrender including, according

<sup>1</sup> *Commonwealth v. New South Wales* (1923), 32 C.L.R. 200.

<sup>2</sup> *South Australia v. Victoria* (1911), 12 C.L.R. 667.

to the courts, water rights but not minerals,<sup>1</sup> and Manitoba, Saskatchewan, and Alberta were not granted their lands, which were instead reserved for Dominion control in the interests of immigration and of the whole of Canada. In 1906 provincial needs compelled a reconsideration of subsidies, which was effected by Imperial Act in 1907, the Dominion hoping vainly thus to have the issue settled for ever, despite the protests of British Columbia that the situation was still unfair. The provinces continued to protest against their absence of lands, and in 1930, after prolonged delays the issue was finally disposed of when the Dominion surrendered control of the lands to Manitoba, Saskatchewan, and Alberta, and of the railway belt to British Columbia. The subsidies payable were at the same time revised, the agreements being confirmed by Imperial Act. Saskatchewan however, demanded as part of the settlement a judicial decision as to her claim to be entitled to compensation for the use made of the lands by the Dominion during the time when they were withheld, but this remarkable claim was naturally found to be without legal foundation both in Canada and by the Privy Council.<sup>2</sup> The provinces are now in grave need of further funds, and the issue of amending the constitution to help them is now under consideration without much prospect of decision.

The constitution provided for internal freedom of trade, and forbade the Dominion or the provinces to tax the property of the other. This does not, however, mean that Canada cannot raise Custom duties on a province's wine imports,<sup>3</sup> and the lands of the Dominion in any hands but the Government itself are certainly not free from local

<sup>1</sup> *A.-G. of British Columbia v. A.-G. of Canada* (1889), 14 App. Cas. 295.

<sup>2</sup> *A.-G. for Saskatchewan and A.-G. for Alberta v. A.-G. for Canada*, [1932] A.C. 28 Cf *A.-G. for Manitoba v. A.-G. for Canada*, [1935] A.C. 184

<sup>3</sup> *A.-G. for British Columbia v. A.-G. for Canada*, [1924] A.C. 222.

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(8) A feeble compromise determined that for the first ten years of the Commonwealth the federation should give back to the States three-quarters of the Customs and Excise revenue collected. At the close of that period a system of payments of 25s. *per capita* to the States was adopted. The war, however, completely upset the balance of financial arrangements, and the Parliament discontinued the system in 1927. In lieu, under agreements with the States, the State debts were from July 1, 1929, taken over by the Commonwealth, elaborate arrangements being made as to the payment of agreed sums by States and Commonwealth<sup>2</sup> as interest and sinking fund. In future loans were to be controlled by a Loans Council representing the Commonwealth and the States, which should have power to limit borrowing to such sums as should be practicable to raise at reasonable rates. The agreements with the States were accompanied by the alteration of the constitution, so as to provide that the Parliament of the Commonwealth might make laws as to the carrying out by the parties thereto of any agreement made between the Commonwealth and the States. The importance of this alteration, duly approved by referendum on November 17, 1928, was made obvious in 1932 when New South Wales persisted in default in respect of her interest payments on her debt. In 1931, at her first default, Mr. Scullin arranged for payment by the Commonwealth and proceeded to sue the State, but the matter was compromised, the State agreeing to pay. A second default, however, followed, and the Commonwealth hesitated to pay,

<sup>1</sup> *Halifax Corpn. v. Fairbanks' Estate* (1927), 44 T.L.R. 5, [1928] A.C. 117.

<sup>2</sup> £7,584,912 a year for 58 years as interest and 2s. 6d. per cent as sinking fund.

having been advised that the legal liability was not clear. Moreover, it was held best to expose Mr. Lang's default to the world, even at the cost of weakening Australian credit. The Commonwealth then passed two Acts in 1932, the one to accept full liability and to give bondholders a right to sue the Commonwealth the other to provide for the enforcement of the agreement. The procedure under the new Act permits, on a certificate of default by the Auditor-General, resolutions by Parliament authorising payment to the Commonwealth in lieu of the State of specified revenues, whereupon the State taxpayer would be discharged only by payment to the Commonwealth. At the same time reference would be made to the High Court to declare that the State was in default, though action might be taken before the Court decided the issue. The Act was held valid by the High Court on an injunction against action being taken under it being claimed by the State. The State, however, persisted in default, including default on the internal as well as the external debt, and it was calculated that by June 30 its defaults would total £7,200,000. Accordingly a further Act was passed to make it clear that, once the Auditor-General had certified, fresh sources of revenue might be seized under resolutions of the houses. Moreover the Financial Emergency (State Legislation) Act was passed to counter the attempt of New South Wales to levy 10 per cent of the value of every mortgage in the State.<sup>1</sup> The Commonwealth Act was based on the taxation power, and power as to insurance, banking, foreign corporations, and trading and financial corporations formed within the Commonwealth. Luckily the dismissal of Mr. Lang enabled

<sup>1</sup> This bill was never assented to, as Mr. Lang was dismissed, see p. 231, *ante*. For the litigation see *New South Wales v. Commonwealth* (1932) 46 C L R. 155, (No. 3), 246 (bank can be required to pay State funds to Commonwealth) Leave to appeal to the Privy Council was refused (No. 2) 235.

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the ministry to pass legislation suspending the Acts, and the election in the State gave a majority in June to a Government bent on maintaining the obligations of the State.

The drastic character of the Commonwealth action is obvious, and Mr. Scullin, who did not defend repudiation, was perturbed by it, suggesting that it meant unification which he would vote for, if brought forward directly. In the Senate the cry of State rights was also raised for Western Australia. But the emergency was complete, and the case convincing. If the State was coerced, it was because it was deliberately endeavouring to destroy its obligations and to break the federal bond. It could not be ignored that, if the State left its debts unpaid, the other States must make good the deficit, and thus would be reduced to impossible straits, which must end in wholesale repudiation and disorganisation.

The constitution provides for freedom of trade between the States, an issue which has caused grave difficulties of interpretation. Might a State forbid the export of meat in order to conserve meat resources for use of the Imperial Government?<sup>1</sup> Could the issue be evaded by the purchase compulsorily by the State of the whole wheat output, and its disposition of it at its pleasure? The latter doctrine was asserted by the High Court in *New South Wales v. Commonwealth*,<sup>2</sup> but anything short of that has been ruled by that court to be inadequate. But the Privy Council in *James v. Cowan*<sup>3</sup> has destroyed this doctrine in the wide form which was given to it by the High Court. Reversing a judgment of that court, it has held that an effort by this method in the

<sup>1</sup> *Foggett Jones & Co Ltd. v. New South Wales* (1916), 21 C.L.R. 357; *W. & A. McArthur Ltd. v. Queensland* (1920), 28 C.L.R. 530.

<sup>2</sup> (1915), 20 C.L.R. 54.

<sup>3</sup> (1932), 48 T.L.R. 564; [1932] A.C. 542

form of acquisition by the State of certain quantities of dried fruits to carry out a scheme for regulating the sale in Australia is invalid. The seriousness of the judgment is unquestionable, for it is plain that the method of controlling the industry so as to secure a fair return to growers throughout the State, in lieu of allowing unregulated private profits, is in the public interest. The Council would only admit that acquisition might be valid as a means of countering famine or disease or for purposes of defence. When it was merely as a device for forcing fruit off the Australian market, *i.e.* preventing inter-State trade, it was invalid. In other cases the operation of Section 92 is clearly less open to objection. It has invalidated an effort of South Australia to tax consumers of oil imported from outside the State.<sup>1</sup>

The Commonwealth is forbidden by Section 51 (ii) to discriminate in any of its actions, and it has been ruled therefore that any legislation which does not accord equality of treatment is void, though it is otherwise if the law produces unequal results as the outcome of divergences in local conditions.<sup>2</sup> The criterion of formal equality is clearly the only one possible, for Parliament has no means of knowing, precisely, local conditions, as they will be affected by its enactments.

It was long believed in the Commonwealth that the prohibition of interference with freedom of trade across State boundaries did not bind the Commonwealth, and that accordingly, even when the States were definitely ruled to have no power to do anything which stopped inter-State

<sup>1</sup> *Commonwealth v. South Australia* (1926), 38 C.L.R. 408.

<sup>2</sup> *Cameron v. Deputy Federal Commr. of Taxation* (1923), 32 C.L.R. 68, cf. *R. v. Barger* (1908), 6 C.L.R. 41. Similarly s. 99 forbids giving a preference to a State or part thereof *James v. The Commonwealth* (1928), 41 C.L.R. 442, *Crowe v. The Commonwealth* (1935), 54 C.L.R. 69, *Elliott v. The Commonwealth* (1936), 54 C.L.R. 657, show that this rule is not to be too literally applied.

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<sup>1</sup> [1936] A.C. 578.    <sup>2</sup> (1920), 28 C.L.R. 530.    <sup>3</sup> (1933), 50 C.L.R. 30.

against State power in the High Court, and by its refusal to admit appeals in the controversial cases of *Duncan and Green Star Trading Co. Pty. Ltd. v. Vizzard*<sup>1</sup> and *O. Gilpin Ltd v. Commissioner for Road Transport and Tramways (N.S.W.)*<sup>2</sup>. It is clear that (1) appropriation of goods to prevent them being sold outside the State is illegal, as had been held in *Peanut Board v. Rockhampton Harbour Board*,<sup>3</sup> where Queensland had provided for a system of compulsory marketing. (2) It is illegal to impose a special burden on goods in any State simply because they have come from another State, as Queensland in effect endeavoured to do, but was denied the right, in *Vacuum Oil Co. Pty. Ltd. v. State of Queensland*.<sup>4</sup> (3) All specific restrictions on passage from State to State are illegal, at least under any normal circumstances. Thus it is clear the general prohibition of the entry of potatoes from Tasmania to Victoria, on the score of risk of disease being introduced, is much too wide, as the High Court had ruled in *Tasmania v. Victoria*,<sup>5</sup> and, if the earlier decision as to the limitation of the import of cattle into New South Wales which was ruled legitimate by the High Court in *Nelson, Ex parte (No. 1)*,<sup>6</sup> is to be deemed sound, it must be on the ground that trade in cattle was not wholly cut off, but only regulated, and that power to act was carefully restricted to instances where the executive had definite reason to believe in the existence of disease in Queensland. On the other hand, the Privy Council evidently was not prepared to rule invalid the varying forms of legislation under which the States have laboured to introduce something like order into the competition between road

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<sup>1</sup> See (1935), 53 C.L.R. 493.

<sup>2</sup> (1935), 52 C.L.R. 189.

<sup>3</sup> (1933), 48 C.L.R. 266, see Keith, *Journ. Comp. Leg.* xviii, 121-6, 281, 282.

<sup>4</sup> (1934), 51 C.L.R. 108.

<sup>5</sup> (1935), 52 C.L.R. 157

<sup>6</sup> (1928), 42 C.L.R. 209, cf. *Roughley v. New South Wales; Beavis, Ex parte* (1928), 42 C.L.R. 162.

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XII. and railway traffic.<sup>1</sup> The objection repeatedly renewed was to allege that such regulation imposed disabilities on inter-State as opposed to local traffic, but there is little doubt that in declining to share that view the Privy Council has avoided introducing another complexity into a situation of grave difficulty.

The Commonwealth naturally endeavoured to set the matter at rest by obtaining by referendum relief from the burden of Section 92 as regards the Commonwealth. The referendum, however, showed a majority against the project in every State. In part this was due to the Labour party, which objected to partial action in lieu of wholesale unification, which as has been noted would probably be *ultra vires*, but in part it must be ascribed to the feeling that the difficulties as to marketing were largely due to the grave blunder made when the Commonwealth decided to encourage the settlement of returned soldiers on areas chosen for the production of fruits to be dried and exported. Unquestionably the glut of produce now existing was due to artificial interference, and the same interference has damaged the nascent tobacco industry. Governmental intervention thus has suffered in repute.

(9) The formation of new provinces in Canada was provided for by the process of allowing the admission of British Columbia and Prince Edward Island on addresses from the legislatures approved by the Queen in Council; Newfoundland was placed in the same position but has never agreed to federate, despite many intrigues for that purpose. The award by the Privy Council of Labrador<sup>2</sup> to Newfoundland with a much larger area than had once been believed in 1927

<sup>1</sup> Cf. also *Willard v. Rawson* (1933), 48 C.L.R. 316; *Bessell v. Dayman* (1935), 52 C.L.R. 215.

<sup>2</sup> 43 T.L.R. 289.

has strengthened the position of the island, and rendered inclusion in the Dominion<sup>1</sup> less probable at any early date. It is naturally feared that government from Ottawa would neglect the interests of the territory, and local autonomy is prized.<sup>2</sup>

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The British North America Act contemplated the inclusion of the Hudson's Bay Territory, and the North-West Territories, not included in the charter of the Hudson's Bay Company, in the Dominion; the surrender of the charter was authorised by an Act of 1868; the lands granted by the Crown to the Dominion, and Canada gave Manitoba a constitution of provincial type in 1870. This was validated in 1871 by the Imperial Parliament, which also provided that a constitution thus given could not be altered by the Dominion, save, with the assent of the province, as regards boundaries. The Act also authorised legislation by Canada for the territories not converted into provinces, and for the representation of new provinces in Parliament, a power extended in 1886 to the territories. Moreover by Order in Council of 1880 all British territory in North America was assigned to Canada. In 1905 Saskatchewan and Alberta were given provincial rank. In 1912 much of the North-West Territories was assigned to Manitoba, Ontario, and Quebec. What remains outside the provincial system is the Yukon (207,076 square miles, population in 1931, 4230), governed by a Comptroller, aided by an elective Council of three, elected for three years, and the Territories (1,309,682 square miles, population 9723) governed by a Commissioner, a Deputy, and five Councillors appointed by the Dominion Govern-

<sup>1</sup> Newfoundland suggested sale to Canada for 100,000,000 dollars.

<sup>2</sup> For the case for and against federation see Report of the Royal Commission on Newfoundland, Cmd 4480, pp. 186-91, Keith, *Journ Comp Leg.* xvi. 34, 35.

Chapter XII. ment. Subordinate legislative powers are exercised in both areas, but supreme legislative power rests with the Dominion.

(10) In Australia the earlier federation movement contemplated the inclusion of New Zealand in the federation, but that Dominion definitely rejected the suggestion on grounds of distance. The decision is clearly wise. The question, therefore, which remains is the possibility of constituting new States. For that there is abundant legal power,<sup>1</sup> but the consent of the State Parliament is always needed. Proposals for the cutting-up of Queensland into two or three States or the increase generally of the number of States have been numerous but unfruitful. But a State may surrender territory, whereupon the Commonwealth has full legislative power. This is the position of the Northern Territory. It was surrendered by an Act of South Australia of 1908, and, after due provision had been made by the Commonwealth Parliament for its administration in 1910, transfer took place in 1911, the aim, of course, being that the resources of the Commonwealth should be applied to the utilisation of that enormous undeveloped territory. Nothing, however, so far has come of the transfer. The area was in 1927 divided into North and Central Australia, but the division proved without value, and was undone in 1931. Legislation for the area rests with the Governor-General in Council, who issues Ordinances. The administration is controlled by an Administrator at Darwin, with a deputy at Alice Springs, who exercises his powers, save those of fixing the date of commencement of Ordinances and of making regulations under Ordinances, for the area south of 20 degrees South latitude.

The federal Parliament has also unrestricted power to

<sup>1</sup> Constitution, ss. 121, 123, 124.

legislate for the capital territory,<sup>1</sup> the area including Canberra. Under an Act of 1930, amended in 1935 (No. 39), the territory is administered by the Minister for the Interior, with the aid of the other departments of State in matters falling within their immediate scope. Under him as reconstructed in 1932 there is an Advisory Council of four officials and three inhabitants who are elected for two years, by adult franchise.

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These areas, of course, are part of Australia, but, unlike Canada, the Commonwealth controls areas which are not within her boundaries. These will here be dealt with together with the Commonwealth mandates.

(a) The Commonwealth has, under Section 122 of the constitution, full legislative power over any territory placed by the Crown under its control. There can be no doubt that this power is definitely applicable to the case of Papua, formerly known as British New Guinea, being that portion of New Guinea which was declared British after the acquisition by Germany of a large area in the north-east of New Guinea, and long administered by the Governor of Queensland on Crown Colony lines. Transfer of control was provided for by letters patent of 1902, but was delayed until 1906, when control was accepted by the Commonwealth under the Papua Act, 1905. The territory is governed on simple Crown Colony lines by a Lieutenant-Governor with a nominated Executive Council of nine members, which, reinforced by five unofficial members nominated by the Governor-General in Council, constitutes the Legislative Council. Legislation may, of course, be disallowed by the

<sup>1</sup> *Federal Capital Commission v Laristan Building &c Co.* (1929), 42 C L R 582. The Supreme Court of the Seat of Government exercises jurisdiction also over Jervis Bay which is federal territory (Act No. 27 of 1935). Appeal lies to the High Court under the Seat of Government Supreme Court Act, 1933 (No. 34).

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XII. same authority, and assent to Bills reserved by the Lieutenant-Governor, who is instructed to reserve certain specified classes of Bills, is given or withheld by the same authority. There is one deviation in this regard from the rules normal in Crown Colonies,<sup>1</sup> where instructions to reserve are given in a prerogative instrument and where assent contrary to instructions does not invalidate a measure. The Papuan instructions being included in the Act, an assent given contrary to them nullifies the measure. The Lieutenant-Governor acts as Chief Justice.<sup>2</sup> There are Resident Magistrates in eight divisions, and for petty matters native magistrates' courts.<sup>3</sup>

(b) Papua is British territory, and the same remark applies to Norfolk Island, that tiny island of 8528 acres extent, which is 930 miles from Sydney and 630 from New Zealand. The present population, of mixed blood in large measure, includes many descendants of the Pitcairn Islanders, themselves in part the offspring of the mutineers of the *Bounty*, who were removed thither in 1856, as that island was too small to support their numbers. The island prior to federation was controlled by the Governor of New South Wales, and it was only in 1914, after prolonged delay, that it fell to be administered by the Commonwealth under the Norfolk Island Act, 1913. From January 1, 1929, the island has fallen under the Prime Minister's Department. The Acts of the Commonwealth Parliament do not normally bind the territory, but may, of course, do so by

<sup>1</sup> So provided in the Colonial Laws Validity Act, 1865, s. 4.

<sup>2</sup> Appeal lies to the High Court of Australia.

<sup>3</sup> Much of Papua remains unadministered. As the natives are very feebly organised and far from amenable to control, the most useful agencies in keeping in touch with them have proved to be native police. Civilising influences are only very gradually extending, as the Commonwealth is, not unnaturally, reluctant to expend funds in an ungrateful task. Care has been taken to protect the natives from exploitation by Europeans and others.

specific enactment. The Governor-General in Council has power to legislate by Ordinance. Administration rests with an Administrator who acts also as Chief Magistrate and has both criminal and civil jurisdiction, the interesting procedure in capital causes, a relic of more primitive days, is recorded later. There is an appeal to the High Court of Australia in both criminal and civil matters, as also in the case of Papua. In order to give the local inhabitants a share in determining their conditions, the old system of an Advisory Council has been made statutory (No. 14 of 1935) in the shape of an Advisory Council of 8 members, half elected yearly by adult franchise, which advises the Administrator. One interesting feature regarding it is the fact that normally any proposed Ordinance must be submitted for its consideration before it is enacted by the Governor-General in Council. The island enjoys the privilege of free admission of its produce into the Commonwealth, denied to Papua and other territories.

In accordance with their difference in status, the power of pardon which in Papua is exercised by the Lieutenant-Governor is accorded in Norfolk Island to the Governor-General, who of course acts in Council in its exercise.

(c) Further, no doubt under the power conferred by Section 122, the Commonwealth legislated in 1933 (No. 8) to make provision for the government of certain lands placed under its control by Order of the King in Council. The more important of these is the Australian Antarctic Territory, which has been declared annexed to the Crown, and which covers all islands and territories other than Adélie Land, which is claimed by France, lying south of the 60th degree of South latitude, and between the 160th and 45th degree of East longitude. With the Ross Dependency of New Zealand, this annexation secures for the British

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Crown wide control over the regions of the South Pole. The legislative power rests with the Governor-General in Council, who makes Ordinances, subject to the usual power of either house to disallow any such Ordinance. The Imperial Order in Council is dated February 7, 1933, and probably the simplest method of taking the authority for it is that it is rendered proper by the provision in the constitution and the legislation of Australia to give effect to it from August 24, 1936.

(d) The same view applies to the Ashmore and Cartier Islands placed under the Commonwealth by Order in Council of July 23, 1931, and made effective by Australian acceptance by the Ashmore and Cartier Islands Acceptance Act, 1933 (No. 60). In their case it is expressly provided that the Acts of the Commonwealth shall not apply unless expressly so enacted therein, and the legislative power is conferred on the Governor in Council of Western Australia.

(e) Much less unanimity exists regarding the source of the Commonwealth authority over the Mandated Territory of New Guinea, which was conquered by Australian forces during the war, and which was allocated in mandate to the Commonwealth by the principal Allied and Associated powers to whom Germany had, under the Treaty of Versailles, 1919, transferred her authority over the area, which includes the north-east of the mainland of New Guinea, the Bismarck Archipelago, and the two northernmost of the Solomon Islands, Bougainville and Buka, an area rather larger (93,300 square miles) than Papua (90,540). It is, of course, clear that, unlike the territories above mentioned, New Guinea is not British territory, and the Prime Minister of the Commonwealth emphatically negatived any idea of claiming it as such when that suggestion was mooted as a means of negativing the German claim for retrocession. It

accordingly with other mandated territories appears in the list of territories connected with the Crown in the Official Coronation Programme, thus being sharply distinguished from the Anglo-Egyptian Sudan<sup>1</sup> and the New Hebrides, which are held in condominium with Egypt and France respectively. But the Crown does not claim full sovereignty.

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It is natural to suggest that the authority from the constitutional point of view for control over New Guinea should be sought in Section 122 of the constitution, which gives legislative power over any territory placed by the Crown under the authority of and accepted by the Commonwealth or otherwise acquired by the Commonwealth, words surely wide enough to cover the position, and so held by the High Court in *Mainka v. Custodian of Expropriated Property*,<sup>2</sup> and by Dixon, J., and Starke, J., under the first and second branches of the authority in Section 122 in the later case of *Jolley v. Mainka*.<sup>3</sup> Evatt, J., holds a different view, expounded at generous length, which stresses the view that, as a member of the League, the Commonwealth accepted the mandate direct, and has power to legislate under Section 51 (xxix) as a matter of external affairs. He differs from the opinion of Isaacs, J., in the former case, where he placed reliance on the powers of the Imperial Act of 1919 to authorise the carrying-out of the treaty of peace. The same issue as to source of authority has been raised in New Zealand.<sup>4</sup> It seems rather a vain speculation seeing that the existence of authority is patent.

The New Guinea Act, 1920, created New Guinea a terri-

<sup>1</sup> The motives for this omission are uncertain, but apparently the cession of all sovereignty to Egypt is possible, in order to secure Egyptian co-operation against Italian efforts to control the Mediterranean; Keith, *The King, the Constitution, the Empire, and Foreign Affairs, 1936-1937*, pp. 135-7.

<sup>2</sup> (1924), 34 C.L.R. 297.

<sup>3</sup> (1933), 49 C.L.R. 242

<sup>4</sup> See Chapter XX (1), *post*.

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tory of the Commonwealth and placed it under an Administrator, power to legislate being reserved to the Governor-General in Council. In 1932 the Act was amended (with an addition by No. 63 of 1935) to create an Executive Council and a Legislative Council of eight official and seven unofficial nominated members, of whom one is placed on the Executive Council to represent thereon the views of the unofficial members. Legislation is subject to the same conditions of reservation as in Papua, and indeed the rules there have been copied so faithfully that a provision forbidding assent to any measure previously disallowed by the Crown finds place, although the Crown has never been in a position to disallow legislation for New Guinea. Any legislation, moreover, is invalid if it runs counter to the terms of the mandate, as extended by the Act of 1920, which forbids all compulsory labour, and not merely such forms as the mandate forbids.

Under the Act of 1920 military rule ceased on May 9, 1921, when Ordinances took effect, substituting English law for German, applying various Commonwealth and Queensland Acts,<sup>1</sup> and preserving to the natives their land rights and their customs as regards cultivation, barter, hunting, and fishing. Save where they conflict with the general principles of humanity, respect is assured for native tribal institutions, customs, and usages, but there is absolute prohibition of the supply of firearms, ammunition, liquor, and opium. A system of law courts has been introduced, but administration remains, as under the German régime, very imperfect. The dissemination of civilisation, a duty imposed by the mandate, can only be slow, unless very large sums of money are made available by the Commonwealth. There is now a Chief Justice and a Judge, and appeal

<sup>1</sup> *Booth v. Booth* (1935), 53 C.L.R. 1.

lies to the Commonwealth High Court. It is, however, probable that the appeal is not that under the constitution, Section 73, for the New Guinea Court seems not to be a federal court.<sup>1</sup>

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(f) The case of Nauru is exceptional, because the government rests on an agreement of 1919 amended in 1926, between the United Kingdom, the Commonwealth, and New Zealand, which was given the force of law by legislation in each country. The administrative, legislative, and judicial power is vested in an Administrator, who acts subject to the control for the time being of the Commonwealth Government. He may legislate for peace, order, and good government, subject always to strict observance of the restrictions of the terms of the mandate approved by the League of Nations, set up courts and magistrates, and maintain a police force. He is solely responsible for the moral and general welfare, conditions of work, and health of the inhabitants. The native population is about 1650, but some 180 Europeans and 1100 Chinese under engagements carry out the work of the Government and the important duty of extraction and despatch of phosphates, some 500,000 tons having been exported in 1935. The ownership of the deposits is vested in the three Governments in the proportions of 42 per cent each for the United Kingdom and Australia, and 16 per cent for New Zealand, these being the proportions in which they contributed to the sum of £3,500,000 paid to the Pacific Phosphate Company for its rights therein, which in turn were derived from a German Company.

The exploitation of the phosphate rests with a Com-

<sup>1</sup> The issue has been raised in regard to the Northern Territory; *Porter v. The King, Yee, Ex parte*; cf. *Edie Creek Proprietary Ltd. v. Symes* (1929), 43 C.L.R. 53. For the Central Court as federal see *Mainka v Custodian of Expropriated Property* (1924), 34 C.L.R. 297; against, the view apparently taken in *Porter v. The King* (1928), 37 C.L.R. 432.

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mission appointed by the Governments, whose business it is to dispose of the production for agricultural purposes in the countries concerned in the above proportion, unless any one waives its claim. This arrangement has been criticised by the Permanent Mandates Commission and elsewhere as involving the creation of a monopoly to the disadvantage of the natives. But it is plain that the commercial rights of the Governments were duly acquired at a heavy cost, and the only legitimate criticism is that they should not have placed themselves in such a position that their commercial and financial interests may run counter to their duty to the natives, whose welfare is their sacred trust. The Governments are bound in no way to interfere with the activities of the Commission, an arrangement suggestive of difficulty if such operations reached the stage of interfering with the possibility of maintaining native life on the island. But it is understood that care will be taken to secure that no such contingency can arise.

The Administrator is aided by an advisory council of two Europeans selected by himself, and two native chiefs elected by the natives. As in the case of New Guinea, an annual report is rendered to the League of Nations, giving a full account of the position of the natives, whose interests are thus safeguarded.

As already mentioned, Commonwealth legislation for the territories is plenary and unhampered by rules affecting the federal Parliament, e.g. the principle of Section 55 of the constitution that laws imposing taxation shall deal with one subject only,<sup>1</sup> or the rule of Section 80, that trials on indictment of any offence against any law of the Commonwealth shall be by jury.<sup>2</sup> But as noted above, the general principle

<sup>1</sup> *Buchanan v. The Commonwealth* (1913), 16 C.L.R. 315.

<sup>2</sup> *R. v. Bernasconi* (1915), 19 C.L.R. 629.

is that federal Acts do not apply to these extra-Australian territories unless specifically so enacted, the legislative power being normally exercised only by the authorities upon whom it is expressly conferred.

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In these territories again, while the essential basis of the law is that of England, for matters affecting natives regard is necessarily paid to native law and custom where not repugnant to justice and humanity. In Norfolk Island the old system of laws is maintained in operation where not expressly altered or repealed.

## CHAPTER XIII

### THE FEDERATIONS—THE DIVISION OF POWERS

**Chapter XIII.** In the federations the formal allocation of powers by the constitutions may fairly be said to be of comparatively little importance as compared with the interpretation of these powers by the courts, on the one hand for Canada the Privy Council, on the other for Australia the High Court. In both cases the constitutions have been made to yield results hardly at first sight to be expected.

(1) The scheme of the British North America Act, 1867, has been pronounced to depart widely from the true federal model by Lord Haldane,<sup>1</sup> on the score that it does not as in the United States constitution leave the existing units with their powers, save in so far as they are expressly withdrawn or are given to the federation exclusively. Whether this criticism is quite just depends on the assumption that "federal" has this connotation, and the issue is not of importance. The essential fact is, that the Act does undertake to divide the powers of legislation and government necessary for Canada between the federation and the provinces,<sup>2</sup> and, as it must be assumed that all the powers requisite are implicitly or explicitly contained therein, the distribution is careful to provide for such residuary authority as is demanded. It therefore gives the provinces exclusive

<sup>1</sup> *A.-G. for Commonwealth v. Colonial Sugar Refining Co.*, [1914] A.C. 237, 252.

<sup>2</sup> *A.-G. for Ontario v. A.-G. for Canada*, [1912] A.C. 571, 581

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powers in respect to the topics enumerated in Section 92, and all other power is assigned to the Dominion. But, as the heads of Section 92 cover, or might be held to cover, many powers which are necessary for the peace, order, and good government of the Dominion as a whole, these matters are set out in Section 91, but not so as to restrict the general authority accorded to legislate on all matters not exclusively assigned to the provinces.

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The national powers include (i) those necessary for the maintenance of the federal government; control of the civil and other services; taxation; borrowing; the public debt and property; of which much in the possession of the existing governments was assigned to the federation. (ii) It controls militia, naval and military services, and defence. (iii) It regulates naturalisation and aliens, and Indians and lands reserved for them. (iv) It has important economic powers, the regulation of trade and commerce; navigation and shipping, beacons, buoys, lighthouses, quarantine and marine hospitals; postal service; ferries between two provinces or between Canada and any other place; currency and coinage and paper money, banking, legal tender, interest, bills of exchange and promissory notes; patents, copyrights; bankruptcy and insolvency; and weights and measures. Moreover it controls sea-coast and inland fisheries, and steamships, canals, telegraphs, or other works connecting any province with another province or extending beyond its limits, steamship services from Canada, overseas, and—a very important power—works which, though actually situated in any province, are declared by the Parliament either before or after their construction to be for the general advantage of Canada or of two or more provinces. (v) As was natural in 1867, social interests were hardly provided for, but the federation was given control

Chapter XIII. over marriage and divorce in general, and over criminal law and procedure and penitentiaries, but not over the constitution of criminal courts.

To the provinces are assigned (i) the necessary means of maintenance of their organisation, control of provincial officers, taxation (but only direct), borrowing, and management of lands; shop, saloon, tavern, auctioneer, and other licences may be used to raise revenue for provincial, local, or municipal purposes; (ii) municipal institutions, and hospitals, asylums, and like bodies; (iii) local works and undertakings, save as specially given to the Dominion; (iv) property and civil rights, and in special the solemnisation of marriage and the incorporation of companies for provincial objects; (v) generally all matters of a local or private nature in the province; and (vi) the administration of justice, including the constitution of courts, civil and criminal, and civil procedure; the imposition of fine, penalty, or imprisonment for violations of provincial enactments; and the maintenance of public and reformatory prisons. Further, the provinces have power to legislate as to agriculture and immigration, but subject to the paramount power of the federation on these circumstances. Uniformity of civil law in Ontario, Nova Scotia, and New Brunswick might be established by the federation with the assent of the legislatures, but this power will never be used, though on many matters concurrent legislation is not rare in all the provinces. How far the provinces can be assigned delegated powers by the federation is still quite uncertain.<sup>1</sup>

As regards education the provinces were given power to legislate, but the legislation must not prejudicially affect

<sup>1</sup> *Lord's Day Alliance of Canada v. A.-G. for Manitoba*, [1925] A.C. 384, *Keith, Journ. Comp. Leg.* xiii. 124, *R. v. Zaslavsky*, [1935] 2 W.W.R. 34; criticised, *Can. Bar Rev.* xiv. 353-8

provided. In a later case<sup>1</sup> it ruled that the sums expended by the Commission when in office could legally be made a charge on the funds provided for education of Roman Catholics. Since then the strife has moderated through the relaxation by Ontario of her efforts to compel the effective knowledge of English, on the one hand, and the recognition by many Roman Catholics that, in the interests of the French children themselves, knowledge of English is worth acquiring. But an effort has been made to demand for Roman Catholics control of secondary education and funds for that purpose. The Privy Council has ruled<sup>2</sup> that no such legal right exists as it did not exist in 1867, but it has suggested that an appeal to the Governor-General in Council would lie. Fortunately no action by that authority is likely in view of the sad precedent of Manitoba. On the other hand, it has transpired<sup>3</sup> that in Quebec the legislature in 1903 classified Jews as Protestants, so that in 1924 the Jewish community was naturally demanding representation on the Protestant Board for Montreal and the appointment of Jewish teachers for pupils in the schools. It was decided by the Privy Council that the Jewish claim was illegal, that Jews could not be classed as Protestants, and that the proper and legal course was to make separate provision for the Jewish minority, a step since taken.

The Dominion legislative power over topics specially assigned to it does not carry with it rights of property when the subject matter of the exercise of that power is vested otherwise in the provinces. Thus the Dominion control of fisheries is a power of legislative regulation, and does not carry with it the implication of ownership. Likewise the

<sup>1</sup> *Ottawa Roman Catholic Separate Schools Trustees v Quebec Bank*, [1920] A.C. 230. See also Dafoe, *Clifford Sifton*, pp. 61-100, 277-302, 390 f.

<sup>2</sup> *Roman Catholic Separate Schools Trustees v. R.*, [1928] A.C. 363.

<sup>3</sup> *Hirsch v. Montreal Protestant School Commrs.*, [1928] A.C. 200.

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Dominion power over navigation does not enable it to claim property in the bed of the St. Lawrence or in the waters of the river.<sup>1</sup> It has proved impossible for the Supreme Court of Canada to give effective answers to the questions propounded to it regarding the extent of Dominion authority in this regard, and this fact explains the difficulties which attended the reaching of agreement with the United States for the St. Lawrence treaty of 1932. Under the decisions of the Privy Council in the issues of aeronautics<sup>2</sup> and radio control<sup>3</sup> it was doubtless believed that it would be possible by the treaty power, aided by the general power of legislation, to secure the full control necessary to prevent provincial obstruction by Quebec, while Ontario's co-operation had been won by the agreement for Ontario to develop power from the dam to be erected on the Canadian side of the river as part of the scheme for the provision of an effective waterway for traffic from the Atlantic to the Great Lakes. But the treaty has not yet been accepted by the United States, and Ontario became hostile in 1937.

Throughout its interpretation of the Dominion constitution the Privy Council has rigorously adhered to the rule that the Act must be interpreted from its own terms, and has rejected any implications drawn from American constitutional law. Thus it has insisted<sup>4</sup> that it will not forbid provincial taxation of banks, because a province might conceivably use the taxing power to destroy the capacity of banks and thus hamper the federal authority as to banking and the incorporation of banks, although the Supreme Court of the United States had protected banks under federal charter from State legislation as being federal

<sup>1</sup> *Montreal Corpn. v. Montreal Harbour Commrs.*, [1926] A.C. 299.

<sup>2</sup> [1932] A.C. 54.

<sup>3</sup> [1932] A.C. 304.

<sup>4</sup> *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575.

instrumentalities and so to be safeguarded from State intrusion. Again, it has ruled<sup>1</sup> that federal officers are subject to provincial taxation, despite the plausible contention that the provinces might use their power to cripple federal activities. In this regard Australian decisions long preferred the American view. Nevertheless, so persistent is the desire to secure immunity from tax legislation that, in *Forbes v. Attorney-General for Manitoba*<sup>2</sup> in 1937, it was claimed that a Dominion Civil servant was not subject to the Special Income Tax Act, 1933, of Manitoba, a view which the Privy Council, with much patience, disposed of. The mystery remains why special leave was given to argue a proposition so hopeless. One point, however, was of interest. The Privy Council had no difficulty in holding that the Civil servant was an employee, but it also held that the term "employer" could not properly be used of the Dominion Government, in so far as the Act purported to impose an obligation to deduct income tax from salaries. It pointed out, however, that equally the obligation could have no effect on employers outside the province, for "the revenue laws of a country are addressed to the inhabitants of that country and are ineffectual to reach or affect persons beyond its borders". Indeed "it may be accepted as a general principle that States can legislate effectively only for their own territories".<sup>3</sup> On the other hand, there was nothing invalid in requiring the employee of such employers to pay the tax not deducted at the source, for that was not to interfere with persons beyond the jurisdiction. Further, the argument that the Manitoba income tax was invalid because the federation had enacted an income tax

<sup>1</sup> *Caron v. R.*, [1924] A.C. 999, so *Abbott v. City of St. John* (1908), 40 S.C.R. 597, overruling *Leprohon v. City of Ottawa*, 2 Ont. A.R. 522. *Caron v. R.* decides the right of Canada to tax provincial officers

<sup>2</sup> [1937] A.C. 260.

<sup>3</sup> *Croft v. Dunphy*, [1933] A.C. 156, 162.

Chapter XIII. in 1917 and had occupied the field, was summarily negatived, inevitably, as the reasoning would ruin the whole scheme of relations. None the less in *The Judges v. Attorney-General for Saskatchewan*<sup>1</sup> the judges of the province, who are federally appointed and paid, had their cause argued, with the usual result, the Privy Council holding that there was nothing in the judicial office which rendered its emoluments exempt from income tax.

The procedure in the latter case was interesting, for the Lieutenant-Governor in Council referred to the court, under the Constitutional Questions Act (R.S. 1930, c. 60), the question, and the judges, who were naturally interested, had to deal with it *ex necessitate*, though this made them judges in their own cause, contrary to a general principle of English law; but their judicial impartiality was clearly revealed by their holding against their own interests, as had been held by the High Court of Australia, and the Appellate Division of the Supreme Court of the Union of South Africa, that on principle judicial salaries must be open to taxation in the ordinary way.<sup>2</sup>

The issue of bankruptcy is not without difficulty, but is in considerable measure cleared up by the decision of the Privy Council in the *Farmers' Creditors Arrangement Acts Reference*.<sup>3</sup> The Acts impugned were enacted for the excellent purpose of securing that, so far as practicable, insolvency on the part of farmers might be avoided, and that their debts might be reduced or the time for payment extended by a Board of Review, which might, if agreement were impossible, impose its scheme on the creditors. It was

<sup>1</sup> 53 T.L.R. 464.

<sup>2</sup> See *Cooper v. Commr. of Income Tax for Queensland* (1907), 4 C.L.R. 1304; *Krause v. Commr. for Inland Revenue*, [1929] A.D. 286.

<sup>3</sup> *A.-G. for British Columbia v. A.-G. for Canada and others* (1937), 53 T.L.R. 334; [1936] S.C.R. 384; [1937] A.C. 391.

suggested that this was not legitimately brought under bankruptcy and insolvency, but the Privy Council very naturally overruled this difficult and improbable contention. It had already been held in Canada that arrangements for a composition to avoid driving a company into liquidation were a perfectly proper exercise of legislative power.<sup>1</sup>

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On the defence power there have been interesting rulings. It is clear that the provinces can tax the emoluments of members of the defence forces,<sup>2</sup> just as they tax federal officers. But the provinces cannot impose their regulations regarding motors on troops carrying out official duties.<sup>3</sup> More interesting is the ruling<sup>4</sup> that, while it may be enacted that the use of troops to put down disorder shall only be accorded on a promise by the Attorney-General of the province that the province will defray the cost, there is no power to compel the province to pay if it refuses to vote the sum, as no minister can bind the legislature to vote the amount, and appropriation of provincial funds lies with the provincial legislature alone.

The economic difficulties of recent years have been the source of serious issues, which are now before the courts. Alberta Reduction and Settlement of Debts Act, one of the measures of the Social Credit Government—perhaps in this connection rather oddly named—was pronounced invalid in June 1937 by all five justices of the Court of Appeal. The reasons adduced included the fact that it invaded the federal spheres of control of interest and of bankruptcy, delegated to the Lieutenant-Governor powers inconsistent with the

<sup>1</sup> *Companies' Creditors Arrangement Act, In re*, [1934] S.C.R. 659.

<sup>2</sup> *A.-G for Manitoba v Worthington* (1934), 42 Man. R. 540; [1936] S.C.R. 40

<sup>3</sup> *R. v. Anderson*, [1930] 3 Man. R. 84; *R. v. Rhodes*, [1934] O.R. 44, which deny the provinces power to require licences; *R v McLeod*, [1934] 4 D.L.R. 226, allows enforcement of speed rules

<sup>4</sup> *Troops in Cape Breton Reference*, [1930] S.C.R. 554.

Chapter XIII. constitution, and affected civil property rights outside Alberta which is unquestionably forbidden.

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(3) The plan of the Australian constitution differs essentially from the Canadian, for on the true federal model it leaves to the States, by Section 107, every existing power unless it is exclusively vested in the Commonwealth or withdrawn from the State, subject only to the rule that, if the Commonwealth has concurrent power and exercises it, the Commonwealth law prevails (Section 109). It is necessary, therefore, to enumerate the powers of the Commonwealth, and under Section 51 thirty-nine heads of varying importance are enumerated, while further powers by Section 52 are exclusively vested in it. Its powers may be classed conveniently as follows. (1) It has the necessary powers for the maintenance of government: matters relating to the public service; taxation, but without discrimination between States or part of States; the borrowing of money; the acquisition of lands, and matters incidental are ascribed to

<sup>1</sup> Cf. also *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*, [1933] A.C. 168

<sup>2</sup> [1936] S.C.R. 398.

<sup>3</sup> *A.-G. for British Columbia v. A.-G. for Canada*, [1937] A.C. 377.

it. (ii) It controls defence and the use of railways for that end; external affairs;<sup>1</sup> and relations with the islands of the Pacific. (iii) Citizenship is within its power; it regulates naturalisation and aliens; immigration and emigration; the influx of criminals; and people of any race for whom special laws are necessary. (iv) It has extensive powers as to trade, commerce, and industry, though there are important reservations. It regulates trade and commerce with other countries and among the States, but not intra-State trade and commerce; navigation is included, and the regulation of lighthouses, lightships; beacons and buoys; and astronomical and meteorological observations; as well as postal, telegraphic, and telephonic communications. It controls all foreign corporations and financial and trading corporations formed within Australia; currency, coinage, legal tender, and the issue of paper money; insurance, other than State insurance; banking other than State banking, bills of exchange and promissory notes; copyright, patents, and trade-marks; bankruptcy and insolvency; census and statistics; bounties which must be uniform; the acquisition of railways from the States with their consent and railway construction in any State with its consent. Moreover, by a most important clause, it may regulate conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. It can deal also with fisheries in Australian waters beyond territorial limits. (v) For social and health purposes it has power over marriage and divorce with the custody and guardianship of infants; old-age pensions; and quarantine. (vi) It can secure the service of judicial process and execu-

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tion thereof as between the States and the Commonwealth and the recognition of the public acts and records and judicial proceedings of the States. Finally, (vii) it can legislate on any issue referred to it by the States, and, with their consent, on any matter which was formerly reserved to the Imperial Parliament or the Federal Council of Australasia.

The exclusive powers of the Commonwealth are those dealing with the seat of government; with the Commonwealth departments (customs, excise, posts, etc., light-houses, etc., quarantine, and defence), with customs and excise and coinage. The States may not maintain naval or military forces save with Commonwealth consent nor tax Commonwealth property; they may not make anything save gold and silver legal tender. The Commonwealth itself may not establish or prohibit any religion nor impose religious tests; it may not, by any regulation of trade, commerce, or revenue, give a preference to any State or part thereof, and the States may not (Section 117) discriminate between British subjects on the score of residence within or without the State.<sup>1</sup> The Commonwealth may not deprive the residents of any State or the State of the reasonable use of river waters for conservation or irrigation. Free trade among the States is enjoined, and inspection laws, if any, may not be used as sources of State revenue and may be annulled by the Commonwealth Parliament. But States have the same control over liquor brought into them as they have over liquor produced therein.<sup>2</sup> It was contemplated in the constitution that an Inter-State Commission should be set up to deal with such issues as the determination of rates

<sup>1</sup> It may differentiate on the ground of domicile. *Davies and Jones v. Western Australia* (1904), 2 C.L.R. 29.

<sup>2</sup> *Fox v. Robbins* (1909), 8 C.L.R. 115: differentiation is forbidden.

on State railways, but the Commission was held by the High Court not to be capable of exercising judicial power,<sup>1</sup> and it has since 1919 been allowed to remain in abeyance. To grant bounties is in the main a federal function, but the States have full power in the case of bounties for mining for gold, silver, or other metals, and, with the consent of both houses of the Commonwealth Parliament, for other goods.

The executive power, which, as in Canada, is vested in the Crown and exercisable by the Governor-General,<sup>2</sup> extends to the execution and maintenance of the constitution and of the laws of the Commonwealth. It is not, however, necessary to hold that only such executive power exists as can be assigned definitely to some head of legislative power; whatever executive authority is necessarily involved in the existence of the constitution may be assumed to exist, and, where legislation is possible, executive action may be possible before any legislation has been passed; this is clear in regard to external affairs, and can be applied to any other head where prerogative powers would exist in a unitary State. In other words, the royal prerogative powers in respect of matters made federal appertains to the federation, just as those in respect of matters affecting the sphere of State activity remain in the hands of the State Government.

The issue was touched upon in *Attorney-General for Victoria v. The Commonwealth*<sup>3</sup> where the issue was the validity of the action of the Commonwealth Government in maintaining a clothing department, which not merely supplied clothing for the defence forces and postal employees and other Commonwealth departments, but also for certain State employees and even private persons. This

<sup>1</sup> *New South Wales v. Commonwealth* (1915), 20 C.L.R. 54.

<sup>2</sup> Const s 61. No power is given expressly to the King personally in Canada or Australia as opposed to the Union.

<sup>3</sup> (1935), 52 C.L.R. 533; Keith, *Journ. Comp. Leg.* xviii. 119, 120.

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was held by the majority of the court valid as an incidental use of an instrumentality which had a main purpose which was subserved by the extra work done by the department, thus enabling it to be kept in full running order. Starke, J., who dissented, admitted expressly that the executive power of the Commonwealth might not be restricted to matters affecting the transferred departments or those on which the Commonwealth might legislate. He also admitted that the department might without statutory authority manufacture uniforms for the postal service, but he held that manufacture for State officials or private persons went beyond anything authorised under the defence power or on any other ground. He was certainly on very strong ground when he denied that the action of the Commonwealth could successfully be defended on the score that Section 81 of the constitution gives power to appropriate money for the purposes of the Commonwealth, and that such purposes may be anything thought fit by Parliament.<sup>1</sup> Plainly appropriation must be relevant to some matter clearly federal. This is strongly supported by the Privy Council's refusal in the case of Canada to sanction the attempt to operate a system of social insurance on the score that the Dominion has unrestricted power to raise taxation, and to spend money on any objects selected by it.<sup>2</sup> Moreover the High Court itself, in *The Commonwealth v. Australian Commonwealth Shipping Board*,<sup>3</sup> expressly held that the defence power could not be relied upon to justify the Commonwealth, whether by executive or by legislative action, setting up manufacturing or engineering businesses for general commercial purposes in time of peace merely

<sup>1</sup> This view has some American authority, but the question whether it can be applied to Australia is much disputed, see Constitution Commission Report, 1929, pp. 137 f.

<sup>2</sup> See p. 484, above.

<sup>3</sup> (1926), 39 C.L.R. 1.

because such activities might have an indirect bearing on the operations of a defence department.

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(4) In the case of the Commonwealth the High Court as first constituted was dominated by men (Sir S. Griffith, Sir E. Barton, and Mr. R. E. O'Connor) who had studied deeply the interpretation of the United States constitution, and whose minds therefore led them to interpret the wording of the constitution in the light of the principles of construction laid down for that instrument by the jurisprudence of the Supreme Court of the United States. The assumption that this line of reasoning should be followed was perfectly natural to those who knew under what auspices the constitution had evolved, and the tendency in the United Kingdom to regard the High Court's procedure as unnatural is clearly far from just. There is, in fact, much truth in the view held by the High Court that the Privy Council was imperfectly familiar with American constitutional law, and that in interpreting the constitution it brought to it a system of its own based on the construction of unified constitutions which was not really applicable to the framework of a federal constitution. The British North America Act, in fact, in the High Court's view, had not been construed as a federal constitution should be, or at least it must be taken that the Canadian constitution was not truly federal, a view for which, as has been seen, Lord Haldane's authority can be cited.

It was inevitable that, holding these views, the High Court should constantly oscillate between obedience to the literal meaning of the constitution and implications derived from American practice. This factor of literal or broader construction appears very clearly in the two lines of judgments given as to the extent of its appellate jurisdiction, under Section 73 of the constitution, from all judgments of

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the Supreme Courts of the States. On the one hand, it was ruled in *R. v. Snow*<sup>1</sup> that the general terms were not intended to cover the case of an appeal from an acquittal, in view of the regular English doctrine that no appeal lies from the verdict of a jury in such cases. On the other, the literal meaning triumphed in so far as, contrary to English practice, an appeal was held to lie from the findings of the courts below in the case of habeas corpus proceedings discharging the accused.<sup>2</sup> This divergence, perplexing as it is in so simple an issue, was far more serious when the question arose of the application of American doctrines. Of these, two were of fundamental importance. The American courts had laid down<sup>3</sup> that, in order to prevent the States destroying the operation of federal laws, it was necessary to rule that any State law which might hamper the operations of federal instrumentalities was void, and logically they extended<sup>4</sup> the same protection to State instrumentalities against federal intrusion. Moreover they protected the States by a generous interpretation of their reserved powers, that is the doctrine of Amendment 10 of the United States constitution, that all matters not withdrawn from the States by the constitution remain within their sole authority.<sup>5</sup>

Applied to Australian conditions, this resulted in the decision that the salaries of federal officers were exempt from State taxation, whether as in *D'Emden v. Pedder*<sup>6</sup> in the form of the necessity of giving a receipt stamp, or as in

<sup>1</sup> (1915), 20 C.L.R. 315.

<sup>2</sup> *A.G. for the Commonwealth v. Ah Sheung* (1906), 4 C.L.R. 949. Contrast *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603.

<sup>3</sup> *McCulloch v. Maryland* (1819), 4 Wheaton 316.

<sup>4</sup> *Collector v. Day* (1870), 11 Wall. 113.

<sup>5</sup> Section 107 of the Australian constitution is the parallel.

<sup>6</sup> (1904), 1 C.L.R. 91.

*Deakin v. Webb*<sup>1</sup> in the shape of income tax. Reference has already been made to the dissent from that doctrine of the Privy Council in *Webb v. Outrim*,<sup>2</sup> in which case the Privy Council simply applied the rules of English construction, and very naturally found nothing in the constitution to take away the normal application of the taxing power of the State. It held equally, contrary to the view of the High Court, that under the Order in Council dealing with appeals from the Supreme Court of Victoria to the Council an appeal lay whether the issue were federal or not, and that, as the Order in Council was made under the authority of an Imperial Act of 1844, no Commonwealth legislation could override it. The conflict of authority was terminated by the cutting-off by a Commonwealth Act of 1907 of any power of the Supreme Courts of the States to deal with constitutional issues of the powers of the Commonwealth and States *inter se*. The doctrine of the High Court could thus be employed without control. It was applied to deny the validity of municipal rating of Commonwealth property,<sup>3</sup> or the levy of State stamp duty on a transfer of property to the Commonwealth.<sup>4</sup> But, if the Commonwealth thus profited, so did the States, for in the *Railway Servants' Case*<sup>5</sup> it was ruled that awards of the Federal Arbitration Court could not be made to bind a State instrumentality, and it was also ruled that the Board of Water Supply of Sydney was such an instrumentality,<sup>6</sup> though it was denied that municipalities were. On the other hand, the High Court set bounds on the doctrines. It refused to

<sup>1</sup> (1904), 1 C.L.R. 585.

<sup>2</sup> [1907] A.C. 81.

<sup>3</sup> *Municipal Council of Sydney v. Commonwealth* (1904), 1 C.L.R. 208

<sup>4</sup> *Commonwealth v. New South Wales* (1906), 3 C.L.R. 807

<sup>5</sup> (1906), 4 C.L.R. 488

<sup>6</sup> *Federated Engine Drivers v. Broken Hill Proprietary* (1911), 12 C.L.R. 398,  
*Federated Municipal, etc. Employees v. Melbourne Corp.* (1919), 26 C.L.R. 508.

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hold that the Commonwealth could not levy land tax on leasehold estates in land of the States, despite the argument that in this way the Commonwealth could regulate State land policy, though it had no legislative power over State lands.<sup>1</sup> It denied also that the States were precluded from taxing cheques drawn by private customers on the Commonwealth Bank,<sup>2</sup> or transfers of land by the Commonwealth to private individuals.<sup>3</sup> On the same lines it is easy to understand how in *The King v. Sutton*<sup>4</sup> it was possible for the court to hold that the Commonwealth could tax wire netting imported by New South Wales to sell to farmers. The American doctrine protecting instrumentalities has no application to commercial activities as opposed to governmental occupations, and the argument that the Customs Act did not specifically mention the Crown could be disposed of by the view that in a Commonwealth Act the assumption is that it binds all save the Crown in the Commonwealth.

The matter was more difficult in the case of the importation of steel rails by New South Wales,<sup>5</sup> for railways management is a recognised governmental function in the States. Moreover the State pleaded the force of Section 114 which denies the power of the Commonwealth or the States to tax the property of the other. But the justices solved the difficulty in diverse ways, either holding that a Customs duty was not a tax on property but on importation, or that "tax" in Section 114 did not mean "impose customs duties", since it applied also to the States which had no power so to do. The Privy Council solved much more simply the similar issue in Canada by holding that the unequivocal

<sup>1</sup> *A.-G. for Queensland v. A.-G. for Commonwealth* (1915), 20 C.L.R. 148.

<sup>2</sup> *Heiner v. Scott* (1914), 19 C.L.R. 381.

<sup>3</sup> *Commonwealth v. State of New South Wales* (1918), 25 C.L.R. 325.

<sup>4</sup> (1908), 5 C.L.R. 789.

<sup>5</sup> *A.-G. for New South Wales v. Collector of Customs* (1908), 5 C.L.R. 818.

power to tax by Customs duties given to the federation must not be whittled away by the protection of provincial property. On the other hand, the High Court<sup>1</sup> rejected efforts of the Commonwealth to regulate industry in the States by means of the device called the "New Protection", under which industries which respected certain conditions as to treatments of employees, in matters of hours of labour, wages, etc., were to be granted protective tariffs on their output denied to other employers. The power of regulating industry had always been a State matter, and it was not possible that it should be taken away in this indirect manner. Similarly in the *Union Label Case*<sup>2</sup> it was ruled that the Trade Marks Act of the Commonwealth could not be used to authorise an association of workers to register a worker's trade-mark and to penalise the fixing of it to goods not produced by that association, another ingenious device to intervene in the State sphere. Still more important was *Whybrow's Case*<sup>3</sup> in which it was ruled that the awards of the Commonwealth Court of Conciliation and Arbitration could not override the positive laws of the States, as opposed to mere awards of State Wages Boards or arbitral authorities.

Against this mass of consistent jurisprudence only one authority could up to 1920 be cited.<sup>4</sup> Once the High Court in view of a difference of opinion between its members certified a case as suitable for decision by the Judicial Committee. The Commonwealth had enacted a measure giving royal commissions full power to investigate any issue

<sup>1</sup> *R. v. Barger* (1908), 6 C.L.R. 41

<sup>2</sup> (1908), 6 C.L.R. 469. Contrast the Privy Council's recognition of the validity of the C.S. (Canada Standard) mark; *A.-G. for Canada v. A.-G. for Ontario* (1937), 53 T.L.R. 337, [1937] A.C. 405.

<sup>3</sup> (1910), 10 C.L.R. 266.

<sup>4</sup> Isaacs and Higgins, JJ., were added in 1906 and preached dissentient views, tinged with Labour ideals.

Chapter XIII. referring to the peace, order, and good government of Australia. A commission had demanded information from the Colonial Sugar Refining Co. as to its internal constitution and operations. It denied the right, for such issues were State matters. Of the High Court<sup>1</sup> two judges held that the federal law could be interpreted to apply to enquiries within the powers only of the Parliament, but that, this being so, the questions put were too wide; two, that the enquiry could extend to any subject since the constitution might be amended, and thus the questions put were valid. The Privy Council,<sup>2</sup> resting on a literal interpretation of the Act, pronounced the Act invalid. It homologated the doctrine that, where powers were reserved to the States by the fact that they continued to be in State power under the constitution, it was necessary to adduce some proof that they had been handed over to the Commonwealth, and such proof was wanting. The Commonwealth might no doubt frame an Act so as to authorise enquiries on any of the matters actually placed under its control, but it had not done so, and the court would not reconstruct the Act as suggested by the High Court to restrict its operation to matters within its power. This doctrine, it is clear, reasserts the Council's view of literal interpretation as opposed to interpretation by implication.

In 1920, in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.*,<sup>3</sup> the High Court reversed earlier decisions, using a power practised by the Privy Council, but not by the House of Lords. It ruled that the doctrine of the immunity of instrumentalities had no application to the

<sup>1</sup> *Colonial Sugar Refining Co. v. A.-G. for Commonwealth* (1912), 15 C.L.R. 182, certificate for appeal, p. 234.

<sup>2</sup> [1914] A.C. 287. The complaint that the Council went beyond the certificate is untenable.

<sup>3</sup> (1920), 28 C.L.R. 129.

Commonwealth constitution. Instead it was to be governed by the plain fact that Section 5 of the Constitution Act made the laws of the Commonwealth binding on the courts and people of the States. The powers granted, therefore, were not subject to any implied limitation, but merely to any express limitation, and the continuance in force, by Section 107 of the constitution, of the powers of the States was subject to the constitution. It followed, therefore, that the Commonwealth arbitration system being authorised by a Commonwealth Act could be applied to the engineering works and sawmill of the Government of Western Australia, Gavan Duffy, J., alone contending that the States could not be subjected to Commonwealth control. It would, of course, have been possible to dispose of the case by distinguishing, as in America,<sup>1</sup> between trading and governmental activities of the States, and to lay down that in the former the Commonwealth could control them, while being unable to affect political sovereignty; but this was not the view adopted by the majority of the court, which constitutes a definite assertion of the unlimited power of the Commonwealth within the sphere granted to it.<sup>2</sup>

It is significant that the issue arose out of the Commonwealth power to provide for conciliation and arbitration in regard to disputes extending beyond the limits of a State. On no subject has the High Court been more generous in extending the ambit of Commonwealth powers. The provision was carried with difficulty at the Convention session at Melbourne in 1898, and it was then pleaded that it would apply to cases like those of shipping or shearers, where men were mobile and where they were united in organisations

<sup>1</sup> *South Carolina v. United States*, 199 U.S. 437.

<sup>2</sup> Contrast the refusal of the Court in 1935-6 to reverse a previous judgment though disliked by the majority. *James v. Commonwealth* (1935), 52 C.L.R. 570, but that was because the Privy Council could and did do so: [1936] A.C. 578.

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extending beyond State limits, so that no State could effectively deal with their conditions. But the High Court in the *Jumbunna Case*<sup>1</sup> decided that the Court of Conciliation and Arbitration could register a local branch of a miners' union in Victoria as entitled to the procedure of the court, because miners in another State made common cause with those in Victoria in desiring fresh terms. Hence the State unions soon affiliated themselves into federal groups, and thus every industry of any consequence falls as a rule under federal and State control as regards awards of conditions of labour. Moreover, the system has been ruled as applicable to all sorts of employees, such as clerks or bank officials, and the existence of what is merely a formal dispute has been held sufficient to justify the action of the Commonwealth Court. Even when a dispute has been settled in every State but one, the Court has been held to have jurisdiction to make an award covering the whole field. It is easy to see how under this system there has arisen a constant possibility of divergence between State and Commonwealth awards, from which until the decision in 1920 the State Governments had felt themselves safeguarded by the doctrines of the High Court as to immunity of instrumentalities and reserved powers. The most vital of the problems suggested is yet unsolved.<sup>2</sup> If under the authority conceded to it, the Court should regulate the wages of State employees, how could its awards be enforced if the State Parliament would not vote the sums? The result appears to be that, while an award might impose an obligation on the State, it is one of imperfect obligation which the inaction of the State Parliament might defeat.

<sup>1</sup> (1908), 6 C.L.R. 309.

<sup>2</sup> *Australian Railways Union v. Victorian Railways Commrs.* (1930), 44 C.L.R. 319.

But the theoretic inroad on sovereignty is extremely grave, and accounts for serious difficulties felt by the States.

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The importance of the case is enhanced by the subsequent decision of the *Clyde Engineering Co.'s Case*,<sup>1</sup> which asserted in the sharpest terms the subordination of the States. In *Whybrow's Case*<sup>2</sup> it had been ruled that, while the Commonwealth Court could make awards freely, it could not violate State law. Now in New South Wales, legislation had been passed for a 44-hours' week and for payment for that week at the rate which would be payable under current awards for any longer week thereby provided. It was claimed by the State that workers under federal awards enjoying a 48-hours' week must be paid the full sum for 44 hours' work but the Court now refused to accept this reasoning. It insisted that as the power to make an award was given by Commonwealth law, that award outweighed any State law, however clear. Thus the whole of State industrial policy is dependent on the view taken by the Commonwealth Court—not Parliament—as to the terms of awards, and the deliberate will of the electorate on this issue was made liable to nullification by a court wholly irresponsible to it, and not necessarily in any touch with public feeling either in the State or the Commonwealth as a whole. The judgment, however, in its exaltation of the Commonwealth authority, was entirely in accord with the earlier rulings in *Commonwealth v. Queensland*<sup>3</sup> that the federal Parliament could exempt federal loans from State income tax, and in *Davoren v. Commissioner of Taxation*<sup>4</sup> that State officers must pay federal income tax. Far more important than these cases was the decision in *R. v. Brisbane Licensing Court*<sup>5</sup>

<sup>1</sup> (1926), 37 C.L.R. 466; *H. V. McKay Pty. Ltd. v. Hunt* (1926), 38 C.L.R. 308; *McLean, Ex parte; Firth, In re* (1930), 43 C.L.R. 472.

<sup>2</sup> (1910), 10 C.L.R. 266

<sup>3</sup> (1920), 29 C.L.R. 1.

<sup>4</sup> (1923), 29 A.L.R. 129.

<sup>5</sup> (1920), 28 C.L.R. 23.

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XIII. that the federal Act forbidding the taking of State votes on the day of the elections was valid, so that a liquor referendum taken in Brisbane on the day of the polls was invalid. This was clearly an extreme application of the supremacy of Commonwealth law.

The doctrine of State sovereignty was also to be distinctly repudiated by the High Court in *Commonwealth v. New South Wales*.<sup>1</sup> It was there laid down that the State could be sued in tort, arising out of a collision between steamers belonging to the two Governments, despite the contention of the State that it was sovereign, and that to derogate from its immunity there must at least be a State Act. The Court relied on the terms of Section 75 (3) giving jurisdiction to the Court where the Commonwealth is a party. Indeed the State as sovereign was discounted as an unfounded and mischievous idea. In the same way it has been held that the power to acquire property from States or persons carries with it the Crown rights to minerals, so that they pass to the Crown in the Commonwealth.<sup>2</sup> Moreover, it has been ruled that the Commonwealth may grant aid to such State undertakings as roads,<sup>3</sup> despite the suggestion that this is a distinct contravention of the true federal principle. In Canada similarly the Dominion has been permitted to finance an Old Age Pensions scheme concurrently with the provinces, though such a social activity is not *prima facie* in the federal sphere. The decision in *Purrie v. McFarlane*,<sup>4</sup> which holds that the State law as to motor cars applies to a federal military officer, no doubt admits the right of the

<sup>1</sup> (1923), 32 C.L.R. 200

<sup>2</sup> *Commonwealth v. New South Wales* (1923), 33 C.L.R. 1.

<sup>3</sup> *Victoria v. Commonwealth* (1926), 38 C.L.R. 399.

<sup>4</sup> (1925), 36 C.L.R. 170. A province can tax soldiers *A-G for Manitoba v. Worthington* (1934), 42 Man. R. 540. But it cannot control their action under federal law: *R. v. Anderson* (1930), 39 Man. R. 84, *R. v. Rhodes*, [1934] O.R. 44.

State to bind the Crown in the Commonwealth, but its value is greatly reduced by the fact that it also admits the power of the Commonwealth to override State law by a regulation under the Defence Act.

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On the other hand, something has been done to limit the ubiquitous action of the Court of Conciliation and Arbitration. The Labour Government in 1930 endeavoured in vain<sup>1</sup> to hand over decisions to Conciliation Committees, which might act without troubling to cite or hear the parties, on the ground that there would be employers and employees on the Committees who could supply information. But the process of intrusion on individual rights has advanced. In *Amalgamated Clothing and Allied Trades Union v. D.E. Arnall and Sons*<sup>2</sup> it had been ruled that awards could not be applied to persons who were not members of a union and had not been cited. But in *Long v. Chubbs Australian Co. Ltd.*<sup>3</sup> it was ruled that the terms of an award which required certain conditions to be observed favourable to minors were enforceable in respect of non-unionist minors, as the provision of the award fell within the ambit of the dispute. So in the *Metal Trade Employers' Association v. Amalgamated Engineering Union*<sup>4</sup> it was ruled that the Court was not precluded from settling the terms of employment of non-unionists by employers between whom and a union dispute relative to this matter exists, irrespective of the fact whether these employers employ any unionists. It is difficult to see how the matter can be carried much further in the direction of giving the Court virtually legislative power, which is denied directly to the Commonwealth. Fortunately it has been ruled in *Federated School Teachers' Association of*

<sup>1</sup> *Australian Railways Union v. Victorian Railways Commrs* (1930), 44 C.L.R. 319

<sup>2</sup> (1929), 43 C.L.R. 29

<sup>4</sup> (1935), 54 C.L.R. 387.

<sup>3</sup> (1935), 53 C.L.R. 143.

Chapter XIII. *Australia v. State of Victoria*<sup>1</sup> that the educational activities of a State do not constitute an industry, distinguishing their nature from those involved in the work of bank officials<sup>2</sup> or even journalists.<sup>3</sup> It has also been ruled that the power to restrain the activities in the matter of industrial disputes of State authorities does not extend to interference with them when dealing with parties not concerned as such in proceedings before the Court.<sup>4</sup> It has also been ruled<sup>5</sup> that the Court has no jurisdiction where no dispute really exists, if the form of serving demands on employers is gone through, but the fact remains that there is constantly being used the plan of artificially fomenting disputes and unrest in order to obtain awards. It is therefore plain that in no small degree the existence of the Court is a direct source of the very evils which it was designed to prevent. In any case the utter deviation in practice from what was intended by the framers of federation must be stressed as an illustration of the difficulty of predicting how institutions will work out.

In many other matters the States have seen their position seriously affected. Excise duties cannot be levied by them, whether for the laudable purpose of paying for roads from a tax on oil<sup>6</sup> or for the purpose of injuring the opposition by imposing a crushing tax on their newspapers.<sup>7</sup> As we have seen, there is now the menace of the wholesale invasion of their sphere by use of the treaty power under the caption

<sup>1</sup> (1928), 41 C.L.R. 569

<sup>2</sup> *Insurance and Bank Officials' Case* (1923), 33 C.L.R. 517.

<sup>3</sup> (1920), 27 C.L.R. 532.

<sup>4</sup> *Australian Timber Workers' Union v. Sydney Timber Merchants' Assocn.* (1935), 53 C.L.R. 665.

<sup>5</sup> *Caledonian Collieries Ltd. v. Australasian Coal and Shale Employees Federation* (No. 1), (1930) 42 C.L.R. 527; (No. 2), 558

<sup>6</sup> *Commonwealth v. South Australia* (1926), 38 C.L.R. 408.

<sup>7</sup> *John Fairfax & Sons Ltd v New South Wales* (1927), 39 C.L.R. 139. See also *A-G (N.S.W.) v Homebush Flour Mills Ltd.* (1937), 56 C.L.R. 390 (tax on flour)

External Affairs in the rubric of Commonwealth authority.<sup>1</sup> Chapter XIII.

The decisions regarding the effect of Section 92<sup>2</sup> of the constitution leave it wholly uncertain what authority the States have to prevent the influx of undesirables from other territories of Australia into their areas, the ruling in *Benson's Case*<sup>3</sup> suggests that they are largely helpless. The power to keep out tick-infected cattle still exists as laid down by a majority of the High Court, *Nelson's Case (No. 1)*,<sup>4</sup> but the position is wholly uncertain, though it seems possible that, carefully safeguarded, such power may exist, and the kindred decision in *Roughley v. New South Wales; Beavis, Ex parte*<sup>5</sup> suggests that States may still regulate the activities of agents engaged in inter-State trade.

Another source of inconvenience and uncertainty is the far from attractive device by which it is provided as a rule of interpretation of federal Acts that they are to be interpreted by the courts to be good and valid Acts to the extent that they would, but for the invalid part, be deemed valid. It is a device virtually asking the courts to reconstruct the impugned Acts, and already some difficulty has arisen regarding the effect to be given to this rule.<sup>6</sup> It is no doubt a pity that an Act should be wasted for some minor invalidity, but the effort to compel courts to discriminate in this way is open to serious difficulty.

A further serious infringement of the authority of the States is involved in the decision<sup>7</sup> that the Transport Workers' Act, 1928-9 can be interpreted as giving undoubted authority to the Governor-General in Council to authorise

<sup>1</sup> See pp. 443-5, *ante*.      <sup>2</sup> See pp. 460-4, *ante*.      <sup>3</sup> (1912), 16 C.L.R. 99.

<sup>4</sup> (1928), 42 C.L.R. 209.      <sup>5</sup> (1928), 42 C.L.R. 162.

<sup>6</sup> Cf. Commonwealth Acts Interpretation Act, s. 15 a, *Australian Railways Union v. Victorian Railways Comr*s (1930), 44 C.L.R. 319, *Huddart Parker's Case* (1931), 44 C.L.R. 492, *R v. Vizzard, Hill, Ex parte* (1933), 50 C.L.R. 30.

<sup>7</sup> *Huddart Parker Ltd. v. Commonwealth*, as above.

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XIII. the giving of preference in the grant of employment to members of the Waterside Workers' Federation. The Court was much divided on the issue, for obviously it is a strong step to provide that, under a general power as to commerce and navigation, a domestic detail of this sort can properly be regulated so as to give preference to one particular set of men to the detriment of other workers.

In the war the defence power was, as in Canada, regarded by the courts as sufficient to justify much rather remarkable action. Naturally nothing was made by denying the power to enlist for service outside Australia,<sup>1</sup> and it was held that the power sufficed to justify detention on suspicion of disaffection,<sup>2</sup> and regulation of trading with the enemy,<sup>3</sup> as well as the fixing of maximum prices of bread,<sup>4</sup> and of the date of the termination of the war,<sup>5</sup> or the Treaty of Peace Act,<sup>6</sup> 1919, approving the treaty with Germany, or soldier resettlement,<sup>7</sup> or the deportation of an Italian reservist called on by his Government.<sup>8</sup> In peace it has equally been held that religious objections cannot be pleaded against the power to enlist,<sup>9</sup> and it seems that employers may be punished if they penalise persons called on to serve.

Immigration<sup>10</sup> has been interpreted generously to secure wide powers for the Commonwealth. But a person genuinely

<sup>1</sup> *Sickerduck v. Ashton* (1918), 25 C.L.R. 506.

<sup>2</sup> *Lloyd v. Wallach* (1918), 20 C.L.R. 299.

<sup>3</sup> *Weisbach Light Co. v. Commonwealth* (1916), 22 C.L.R. 268.

<sup>4</sup> *Farey v. Burvett* (1916), 21 C.L.R. 433.

<sup>5</sup> *Jerger v. Pearce* (1920), 28 C.L.R. 588.

<sup>6</sup> *Roche v. Kronheimer* (1921), 29 C.L.R. 329.

<sup>7</sup> *A -G for the Commonwealth v. Balding* (1920), 27 C.L.R. 395.

<sup>8</sup> *Fernando v. Pearce* (1918), 25 C.L.R. 241.

<sup>9</sup> *Krygger v. Williams* (1912), 15 C.L.R. 366.

<sup>10</sup> *Donohoe v. Wong Sau* (1925), 36 C.L.R. 404; *R. v. Macfarlane* (1923), 32 C.L.R. 518.

connected by birth and domicile with Australia is not subject to control.<sup>1</sup> Deportation is also within the powers of dealing with aliens,<sup>2</sup> and so the Pacific Islanders, however long settled, could be deported,<sup>3</sup> even though this involved extra-territorial constraint, and the High Court might have insisted on construing narrowly the power to legislate with extra-territorial effect. In the matter of immigration, of course, the extreme freedom from control of the executive must be remarked. In the United Kingdom the executive is unrestricted as regards the entry of aliens, but as against British subjects it has no power, a fact which is objected to in Scotland as regards inability to return to their country indigent Irish citizens. But in Australia the plenitude of power extends to all British subjects, and, while the language test is normally used only against Asiatics or other persons genuinely undesirable, it has been used with complete effect against persons not so open to description. One case<sup>4</sup> in 1936 aroused great feeling and was strongly questioned in Parliament, though the ministry escaped through the diversion caused by the royal abdication. It seems clear that the lady in question, who was asked to undergo an Italian dictation test, had been the subject of unfair attacks, and that the real reason for keeping her out was to prevent danger of alienating the affections of an

<sup>1</sup> *Potter v. Minahan* (1908), 7 C.L.R. 277. Mere domicile if technical is not enough: *Ah Yim v. Christie* (1907), 4 C.L.R. 1428.

<sup>2</sup> Also with British subjects in certain cases: see *Walsh and Johnson, In re* (1925), 37 C.L.R. 36. In 1932 the Immigration Act was amended to include power to remove undesirable persons within five years after entrance, as in the case of Canada.

<sup>3</sup> *Robt. m. v. Brennan* (1906), 4 C.L.R. 395.

<sup>4</sup> *Freer, Ex parte* (1936), 56 C.L.R. 381; 10 A.L.J. 338. On June 2, 1937, the Government wisely relaxed the ban in order to avoid their illiberal action being an object of attack at the election. But the episode remains an example of unfair misuse of legal power.

Chapter XIII. Australian. Another case<sup>1</sup> which excited comment was one in which Scottish Gaelic was deemed not to be a legitimate speech to set, a declaration which so excited indignation that cases of contempt of court were the result.<sup>2</sup> There is difficulty as to the degree of access to the courts permitted, but that was insisted upon in the case in question by the Court. In Canada the Immigration Act and powers of deportation under it have been used with much vigour, and so far as possible recourse to the courts has been prevented.<sup>3</sup>

(5) It is not surprising that so complex a constitution should have elicited repeated efforts at amendment. The early efforts were dominated by the feeling that the Commonwealth needed power to deal with intra-State trade and commerce, with all kinds of corporations, with conditions of labour of every sort, and with monopolies, both by way of control and of operating services as monopolies in the interests of the Commonwealth. Projects, however, were rejected in 1911, and in 1913 the effort to secure their passage, even in altered form and with the division of the projects under six measures, failed of acceptance. The war brought a temporary quiescence, especially in view of the wide interpretation of federal power by the courts, but in 1919 a fresh effort was made to extend federal powers on the familiar lines, with a definitely negative result. The decision of the High Court<sup>4</sup> that a federal award could override State law elicited a new crisis, and in 1926 Mr. Bruce had two referenda submitted, the one to increase the

<sup>1</sup> *R. v. Wilson; Kisch, Ex parte* (1934), 52 C.L.R. 234. A minister's right to refuse admission if he holds a certain opinion (rightly or wrongly) was admitted in *R. v. Carter, Kisch, Ex parte*, 52 C.L.R. 221.

<sup>2</sup> *R. v. Fletcher; Kisch, Ex parte* (1935), 52 C.L.R. 248.

<sup>3</sup> For refusal of bail cf. *R. v. Coleman*, [1935] 4 D.L.R. 444.

<sup>4</sup> *Clyde Engineering Co. Ltd. v. Cowburn* (1926), 37 C.L.R. 466.

powers of the federation so that it might establish authorities to regulate terms of employment of labour in general, and that it might control trusts and monopolies, and the other to enable legislation to be passed in the event of the actual or probable interruption of any essential service. The latter proposal evoked bitter opposition from Labour, which preferred the power to force concessions by industrial unrest and strikes in the port and shipping industries. Moreover, compulsory voting now imposed irritated the electorate, which rejected both proposals. The result was that Mr. Bruce developed a very different policy, that of evacuating the field of conciliation and arbitration save as regards essentially Australian services such as shipping, but that was rejected in Parliament through the opposition of Mr. Hughes and the defection of a group of followers, and in the ensuing general election in 1929 Labour obtained power, only to bring the Commonwealth into the financial impasse of 1931, and its ejection from office. In the meantime a Royal Commission had reported in 1929 on the constitutional issue, but no party sponsored its findings, and Labour proposals for referenda in 1930 were not carried through.

The position is unsatisfactory. Unification desired by Labour is opposed partly by historical considerations, partly by feelings of loyalty to the States, partly by grave doubts of its practicability. The size of Australia renders it necessary to allow of diversity, which is difficult to achieve with mere local machinery, and, if the central Parliament were not to be rendered unable to work, it would have to devolve so much power as virtually to recreate the States though presumably in greater numbers. Financial issues would be extremely difficult to adjust, and members of Parliament would have the greatest difficulty in keeping in touch with

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the large electorates inevitable. Nor is there much chance of real saving. The remedy seems rather to lie in the readjustment of function, above all in the allocation between States and Commonwealth of power to regulate labour conditions on a clear and intelligible basis. It is possible that the Commonwealth should have the power to regulate company law on a uniform system, while leaving the States to regulate, as in Canada, the incidents of their operations. The States again, to perform their functions of self-preservation, might be given power to exclude undesirables and to regulate prices, which is now impossible under the rule of freedom of inter-State trade. Nor is it unreasonable that the States should desire that in the process of constitutional change their Parliaments should be consulted at some stage, in lieu of leaving matters to the federal Parliament and the electorate. It is clear from the negative results of the referenda that the electors cannot be educated sufficiently to pronounce effective judgments in favour of change by this method of action. The position might easily be improved by securing that projects should form the subject of State Government and Parliamentary consideration, so that as far as possible the electors should be asked to pronounce on proposals approved by the Commonwealth and at least a majority of States.<sup>1</sup>

In one sphere reform is urgently necessary. The States control intra-State shipping, the federation other shipping, and collision and other navigation regulations may be issued under State<sup>2</sup> and federal<sup>3</sup> power. Nothing whatever is gained by conflicts on this score, and a surrender of State

<sup>1</sup> See Holman, *The Australian Constitution* (1928). For other suggestions see Keith, *Journ Comp Leg* xiv 114. The Royal Commission reported but without any result.

<sup>2</sup> *R. v. Turner, Marine Board of Health, Ex parte* (1927), 39 C.L.R. 411.

<sup>3</sup> *Hume v. Palmer* (1926), 38 C.L.R. 441.

authority seems clearly requisite.<sup>1</sup> As has been seen, aviation, which is patently proper for federal control, has been refused to be surrendered to complete federal authority no less than marketing of produce, which really is not particularly suitable for that purpose. It does seem as if in this point there was a definite lacuna in the system.

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The right of withdrawal was not contemplated when the federation was created, but the demand was expressly made by Western Australia in 1933 when, after full preparation of the ground beforehand under authority of a referendum contemporaneous with a general election which was fought in part on the issue, addresses from both houses of Parliament were presented to the King and to the houses of the British Parliament asking for legislation allowing the State to sever connection with the Commonwealth. The reasons adduced were many and of very varying strength. The vital element was that the system of federal economics worked essentially for the benefit of the industrial eastern States, whose competition under free trade conditions was inevitably fatal to the possibility of the development of industries in Western Australia. The State, therefore, was compelled to develop merely as a primary producer with no substantial assistance as against the highly advantageous tariff arrangements which aided manufacturers. Other complaints stressed the fact that recent decisions menaced the security of State rights; that grants to relieve the disadvantages of the new activities of the Commonwealth and its entry into the field of State taxation were inadequate in amount; that the Navigation Act, by reason of its provisions as to the coasting trade, deprived the State of the use of British

<sup>1</sup> Latham, *Australia and the British Commonwealth*, pp. 101-5. For the limitation of Commonwealth power see *Owners of S.S. Kalibia v. Wilson* (1910), 11 C.L.R. 689, *Newcastle and Hunter River S.S. Co. v. A.-G. for the Commonwealth* (1921), 29 C.L.R. 357.

Chapter XIII. oversea shipping; that the advantage of defence by the Commonwealth was minimal, that under a separate colonial status the State would be able to create a better balanced economy with judicious encouragement of local industries, and so forth. The Commonwealth denied the validity of most of the representations, and stressed the advantages in the way of assistance in marketing and a premium on gold production given by the Commonwealth. It insisted that the high price of sugar, due to the system of cultivation by costly white labour, was part of the price to be paid for keeping Australia white, and it appealed to the sense of Australian nationality which would be denied by secession. It stressed also the fact that the debt payment arrangement with its intrusion on State authority was a transaction of great financial value to the States, and that it was obviously necessary to have machinery to make it effective against any State which was unwilling to pay its due debt to the Commonwealth. All these arguments and counter-arguments, however, were not weighed by the two houses, to which a Joint Select Committee reported that the petition was not proper to be received by either simply because it did not fall within the constitutional exercise of the paramount legislative power to enact such a Statute as that proposed.<sup>1</sup> It was pointed out that in such a matter the initiative must rest with the Commonwealth, which alone could suggest to the British Parliament the annulment of its provisions. Hence, as no one desired to press the issue further, the matter dropped, and the State has had to remain content with the not ungenerous subsidies provided for all the weaker States by the Commonwealth (in 1937-8

<sup>1</sup> Cf. Keith, *Letters on Imperial Relations, 1916-1935*, pp. 172 ff., 344 f.; *Letters on Current Imperial and International Problems, 1935-1936*, pp. 26-9.

South Australia, £1,200,000, Tasmania, £575,000; Western Australia, £575,000). It must be remembered, as the Commonwealth insisted during the discussion, that the services rendered by the Commonwealth Bank to the States as well as the Commonwealth are very substantial, including the fixing of the premium on sterling on a uniform basis.

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The Joint Committee<sup>1</sup> incidentally expressed the view that the power of amendment does not amount to a power to alter the federal character of the constitution in view of the purpose of the constitution to create an indissoluble federal Commonwealth. This seems a sound attitude to adopt, and is supported by the fact that under Section 128 any alteration of any provision of the constitution affecting any State must be carried out with the assent of that State's voters in the referendum, so that the dissent of even one State would prevent a complete destruction of the federal system. It has been argued that the power to amend applies to that section itself, so that the requirement of the assent of each State could be destroyed by a majority of the States, and, when that had been eliminated, the unification of the Commonwealth might be carried by a majority.<sup>2</sup> But there would be very serious objection to any such procedure, which Sir E. Mitchell has pronounced to be unconstitutional.<sup>3</sup>

On the other hand, it is impossible to accept that authority's suggestion that no constitutional amendment can affect the validity of any agreement under Section 105A of the constitution regarding financial agreements.

<sup>1</sup> H.C. Pap 88 of 1935, para 6. Contrast Mr O. Dixon's view, App F to Constitution Commission Report, 1929.

<sup>2</sup> P. Glynn, *Commonwealth Law Review*, iii 204; Wynne, *Legislative and Executive Powers in Australia*, p. 364.

<sup>3</sup> *What every Australian ought to Know*, p. 79.

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- Chapter XIII. The new clause is indeed very potent, and must be regarded as authorising change of constitutional provisions by agreements as to finance made under it. But it cannot be said that it itself is any more sacrosanct than any other provision of the constitution.

## CHAPTER XIV

### THE UNION OF SOUTH AFRICA

FROM the federations the Union differs in essentials, for it is a unitary State with a very flexible constitution. But its provinces were created as a compromise to the federal ideal, and in South-West Africa, its mandated territory, it possesses what is expected to be the precursor of a fifth province.

(1) Disintegration in South Africa had reached its height in 1858 when Sir G. Grey adumbrated his famous scheme for the restoration of unity by federation, for five republics and three British colonies divided the territory with native races. The Imperial Government regarded his suggestions as premature, and it was not until after the annexation of the diamond fields in 1871 that Lord Carnarvon produced his scheme of federation, which placed on the statute book the abortive Act of 1877. In the same year the premature annexation of the Transvaal completed the ruin of a policy which the grant of responsible government to the Cape in 1872 had rendered impracticable in any event. The conquest of the Transvaal and the Orange Free State opened up the way to renew the idea of federation which Rhodes consistently favoured. For a time it seemed that it might be imposed as a preliminary to responsible government, but the failure to secure the suspension of the Cape constitution defeated any chance of success on these lines. The creation of responsible government in the two former republics

Chapter XIV. seemed for a moment to have hampered federation, but in fact by giving the Transvaal control of its actions it enabled its statesmen to force not merely federation but union on the Cape and Natal. Moreover it ensured that the union should be created from below, not imposed from above as under Carnarvon's scheme, and that the Dutch should have an equal share in its devising. It is significant that Lord Selborne's memorandum<sup>1</sup> attached weight to the argument that a united South Africa would be free of British intervention, which it insisted was inevitable as long as there were four units, whose co-operation must largely be arranged, and whose differences must be settled, by an external authority. Not fear of foreign hostility but desire for national autonomy was a governing factor in the movement.

From the economic point of view it was controlled by the issue of customs and railways, for the coastal colonies desired to secure protection for their own nascent industries and agriculture, while the Transvaal with its mining industry desired cheap imports, and for the traffic to the Rand there was keen competition between the rival Cape ports, Natal and Delagoa Bay. It was the power of the Transvaal to transfer her traffic to Delagoa Bay, and her need for friendly relations with Mozambique in order to secure Portuguese labour for the mines, that dictated largely the nature of events. But the influence of the Cape was hampered by her financial straits. It was from a Railway and Customs conference called to meet on May 1908 that the decision proceeded to abandon any attempt to deal with business on ordinary lines and to advise the summoning of a National Convention of colonial representatives. This body met in 1908-9 at Durban and Cape Town, its report, after criticism in the four Parliaments, was adjusted, and was

<sup>1</sup> *Selborne Memorandum* (1907), pp. 44-8, 116, 145-7.

finally enacted by the Imperial Parliament as the South Africa Act, 1909, the Union taking effect on May 31, 1910. In the case of Natal alone was a referendum of the people deemed necessary for acceptance. There was in fact no real doubt elsewhere that the measure was accepted by the majority of the representatives of public opinion.

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Other considerations, doubtless, were adduced to strengthen the desire for union, such as the necessity of a more systematic native policy suggested by the grave unrest in Natal and Zululand in 1906-8 which had elicited aid from the other colonies, the desirability of unified defence arrangements, of improvements in judicial administration, such as the creation of one Court of Appeal, of assimilation of law on commercial issues, of co-operation in higher education and other matters; but these were incidental rather than fundamental causes of union.

(2) The decision for union, not federation, was largely imposed by the Transvaal. Natal was frankly federal in feeling, there was a good deal of sympathy for federation in the Cape, and the Orange River Colony was rather afraid of centralisation. But considerations of the similarity of conditions, the absence of essential boundaries, the cost and legalism of federation, illustrated by the vast amount of controversy over provincial rights in Canada, and the need of union of Dutch and British in one State prevailed over other considerations of local autonomy. To the federal spirit some concession was made in the mode of choice of the Senate, while in practice, as in the federations, the Cabinet is constructed with regard to the need of representing, as far as practicable, the whole of the provinces. Most important, however, was the decision to continue the provincial areas under a form of government which, while not to resemble too closely the former responsible govern-

Chapter XIV. ment, should be something decidedly more important than mere local authorities. One factor in determining the retention of the provinces was the absence in the northern provinces of those local institutions on which powers might have been devolved if the provinces as such had been abolished, and this difficulty still remains to stabilise the claims of the provinces for maintenance in some form.

The issue of the native vote afforded a motive for the Cape to press for federation as opposed to union. A compromise, however, was reached. The proposal to adopt a uniform franchise, with no colour bar but a high qualification of civilisation, was rejected, but the Cape franchise was entrenched by the rule that it could be abolished only by a two-thirds majority, at a joint session of the two houses,<sup>1</sup> of the total number of their membership. On that basis the other provincial franchises were allowed to stand, the Transvaal and the Orange Free State with adult male franchise excluding all natives, Natal virtually excluding all, but having a property qualification as in the Cape. The provincial factor again was given effect to as regards representation by numbers, a necessary concomitant of the retention of the different franchises. The basis was long debated, as number of voters would have been unjust to the Cape. As it was, the criterion of adult male population, Europeans only being counted, was adopted, but Natal and the Free State were given 17 members each at the cost of the Cape with provision for revision by the census results. The first Parliament had 121 members; when by the growth of population, as is now the case, 150 members are requisite, the basis of partition becomes the number of European adults, the former restriction to males having

<sup>1</sup> *R v Ndobe*, [1930] A.D. 484. The arrangement fell only in 1936; see p. 290, *ante*.

been abolished in 1937, consequent on the extension to all such adults of the vote without property qualifications.

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The provinces again received recognition in the allocation of federal business. Pretoria was made the administrative capital, Cape Town the seat of Parliament, and Bloemfontein the headquarters of the Supreme Court, Appellate Division, a system which is held to cost at least £60,000 a year and to be a cause of much inefficiency and inconvenience.

One suggestion of the Transvaal which would greatly have affected the future of the Union was laid aside. It desired the adoption of proportional representation for elections to the Parliament, so that its principle of "one vote, one value" might be given effect. This was unacceptable to the Convention, and in lieu single-member constituencies were adopted, delimited with a margin of 15 per cent on either side of the quota by Commissions. Proportional voting was retained only for the election of the Senate, which now rests in the hands of the members of the Assembly for the province and the provincial Council in joint session, and the selection of the Provincial Executive Committees. The result has been that large minorities are constantly under-represented, and that the position of the Government in Parliament by no means necessarily reflects its actual votes, thus in 1929 the Nationalists with 144,907 votes captured 78 seats, the South African Party with 156,398 obtained only 52 seats in addition to nine members elected unopposed.<sup>1</sup>

(3) The system of provincial government is deliberately devised to mark its distinctive character. At the head of each province is an Administrator, the title denoting his inferiority to a Lieutenant-Governor, though the terms of

The 1933 election was fought under abnormal conditions.

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his appointment for five years follow the Canadian model. He is selected by the Governor-General in Council and can be removed only before expiry of office on cause assigned, which must be communicated to Parliament. He administers with the aid of an Executive Committee selected by proportional representation by the single transferable vote by the Provincial Council after its election. Members hold office until the next election of the Council and the choice of their successors. They need not be members of the Council, in which they may sit and speak, but like the Administrator may not vote, save as members. They are paid.<sup>1</sup> The authority of the Committee is exercised by a majority vote if necessary, the Administrator having an ordinary and a casting vote. It extends to all matters on which the provinces have legislative power. But in addition the Union Government may impose other duties as its representative on the Administrator, and on these he governs alone. Control over finance is secured to the Union by the fact that the Administrator must grant warrants for all expenditure authorised by Ordinance, and that accounts are supervised by an Auditor chosen by the Union. In emergency the Administrator may authorise expenditure without approval by the Council but subject to reference to it thereafter.

The Councils were given the same number of members as the provinces have in the Assembly, but with an increase to 25 for the Orange Free State and Natal. The Council must meet once in every year; it is summoned and prorogued by the Administrator, but it chooses its own chairman and lays down its own rules of procedure, subject to approval by the Governor-General in Council, who also determines its

<sup>1</sup> This disqualifies for a seat in Parliament, *Ea parte van der Merwe*, [1916], O.P.D. 26.

remuneration. It is elected, for three years originally, but under Act No. 43 of 1935 for five years, and is not subject to dissolution.

The powers of legislation of the Councils are limited and are in every case purely subordinate, for the Union can legislate on any of the topics conceded to the provinces, overriding the provincial Ordinances. Nor have the provinces any safeguard from destruction by the Union, for the only condition hampering such action under the Act of 1909 was the formal requirement of reservation which the Union Parliament might, and in 1934 did, repeal at pleasure, thus being able by simple Act to abolish the whole system, for only a certain moral value attaches to Act No. 45 of 1934 negating action save on petition from each province. The subjects assigned have been considerably varied in detail. Initially the power to raise money by direct taxation<sup>1</sup> was given without reserve, but the use of this authority was found to be inconvenient and the financial powers of the Councils were largely remodelled in 1925. In the same way borrowing has been restricted to borrowing from the Union on its own terms. The essential powers are education, but higher education is under Union control, technical, vocational, and special education being transferred in 1925; agriculture subject to conditions laid down by the Union Parliament; hospitals and charitable institutions; municipal and local government,<sup>2</sup> local works and roads and bridges of

<sup>1</sup> *De Waal v. North Bay Canning Co.*, [1921] A.D. 521 (tax on sale of canned crayfish indirect and invalid), *Clarke v. De Waal*, [1922] A.D. 264, *Johannesburg Consol. Investment Co v Transvaal Prov Adm*, [1925] A.D. 477 (tax on financial companies), *Inland Rev Commr. v. Royal Exchange Ass Co*, [1925] A.D. 223 (tax on insurance premiums)

<sup>2</sup> A health committee cannot be created under this power *Isipingo Health Committee v. Jadwar*, [1926] A.D. 113. But fresh authority was given by the Union, and used by Ordinance No. 4 of 1925. For power to deal with the franchise see *Abraham v. Durban Corp.*, [1927] A.D. 444.

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purely local character; markets and pounds; fish and game preservation; matters deemed by the Governor-General in Council of a local and private nature; and subjects on which Parliament by law confers power of legislation on the province. Of the latter many are enumerated as possible subjects of transfer by agreement in the Financial Relations Act, 1913. They include such matters as township administration; licensing of vehicles on provincial roads; control of horse-racing, betting, and totalisators; regulation of hours of opening and closing of shops and of shop assistants; administration of poor relief; control of cemeteries; control of libraries, museums, public resorts; destruction of weeds and vermin; the experimental cultivation of sugar, tea, and vines; the registration of dogs outside municipal areas; and the making of grants to agricultural societies. The subjects of most importance in practice are education, which is the chief object of expenditure, hospital and poor relief, roads and bridges, townships, game and fish preservation, horse and other racing, and betting.

The finances of the provinces as revised by the settlement of 1925-6 were fixed as follows. The Union pays a subsidy based on the number of European pupils in primary and secondary schools, £16:7.6 up to 30,000, £14 each above that number, with grants for training of teachers and native education, and special subsidies, under Act. No. 50 of 1935, of £125,000 and £275,000 to Natal and the Free State. It also controls licence fees for trades, professions, and occupations, the power to license having been taken from Natal municipalities, but gives the proceeds to the provinces, to which it pays also the sums levied as transfer duties on land, liquor licences, and, in the Transvaal, native pass fees. The provinces, in lieu of their former taxing power, may raise by legislation hospital and education fees; dog licence fees;

fees in respect of licences as to game, fish, or flowers; wheel tax on vehicles and motor licence tax; auction duties; entertainment and amusements tax; betting taxes; person and income taxes; taxes on companies other than mutual life insurance companies; land taxes; taxes on licences to import goods from outside the province for sale therein, and minor receipts arising out of provincial activities.

The system has not worked well despite Union control. Not only may the Union legislate to annul provincial legislation as when the Transvaal Gold Profits Tax of 1918<sup>1</sup> was cancelled in 1921, but each Ordinance must be assented to by the Governor-General, who may reserve it for consideration, in which case it is void if not assented to within a year, or may refuse assent. It had been hoped that the administration would be conducted on business lines, but this idea has been disappointed.<sup>2</sup> The Councils have been divided on purely Union party lines, and both in the Cape and the Transvaal the result of proportional representation has been to produce an even balance at times in the Council, so that the Administrator had had the determining voice, and one Cape Administrator, Sir N. F. de Waal, was for years virtually sole representative of the administrative power. Moreover the provinces have failed to develop their taxation resources, preferring to rely on the obligation, moral if not legal, of the Union to enable them to meet crises. A constant series of deficits has been recorded, and the decision of General Hertzog in favour of unification is not surprising. But it is opposed by members of his own party who dislike unification, and by the members of the former South African Party, which in this matter is largely

<sup>1</sup> Held valid in *New Modderfontein Gold Mining Co. v. Transvaal Prov. Adm.*, [1919] A D 367.

<sup>2</sup> Kennedy and Schlosberg, *South African Constitution*, pp. 330 ff.

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motived by the claims of Natal. Natal indeed has pressed for federal reconstruction of the constitution, while, if this is not conceded, one section of the population would prefer to leave the Union. General Smuts in opposition negatived either true federation or secession, while insisting that due regard for provincial interests might be expected from a Government controlled by his party. Administrative difficulties arise also from the unsatisfactory character of the delimitation of functions between the Union and the provinces, nor is the distinction between the different forms of education at all satisfactory. Unification, even if politically practicable—and the appeal of the Orange Free State for Union intervention in 1932 to meet the financial situation strengthens the case for it—has dangers and difficulties of a serious kind to face. The northern provinces still lack the local institutions to which the functions of the province could be handed over, and above all there is the strongest objection to levying rates on landed property, which should be the chief source of revenue of such institutions.

In addition to their own functions the Councils are given the power to make recommendations of legislation on topics not within their control to Parliament, and they may be used by the Union to take evidence on private Bills.

The whole control of judicial matters is denied to the provinces, but they may impose penalties, including fine or imprisonment, for violation of Ordinances on the matters within their control. The validity<sup>1</sup> of provincial Ordinances has, of course, repeatedly come before the courts of the Union, the superior courts being expressly given jurisdiction in any case where the validity of Ordinances comes into

<sup>1</sup> Their distinction from municipal by-laws is pointed out in *Middelburg Municipality v. Gertzen*, [1914] A.D. 544 discriminating *Kruse v. Johnson*, [1898] 2 Q.B. 91; *A.-G. v. London County Council*, [1901] 1 Ch. 781.

question The most important of the decisions have turned on points of power to tax and have become of no present interest by reason of the changes in power made by the Act of 1925. But it has been laid down<sup>1</sup> that power to tax a trade by licence includes power of regulation of the trade, and that a Council may assign to a municipal body functions which are appropriate to such a body but which it itself does not possess,<sup>2</sup> but that it cannot delegate to a municipality functions properly legislative in character.<sup>3</sup> If it authorises a municipality to collect rates, it is entitled to provide that the owner shall not by contract place his obligation in this regard on the lessee.<sup>4</sup> A poll tax on natives imposed by the Transvaal has been ruled invalid,<sup>5</sup> but municipalities may be empowered to discriminate as regards use of trams by white or coloured persons or Asiatics, though by Section 147 of the South Africa Act, 1909, the control and administration of matters specially or differentially affecting Asiatics rests with the Governor-General in Council.<sup>6</sup> Nor is it illegal for Natal to deprive Asiatics of the municipal franchise, permission to take this action being accorded by the Governor-General in Council after the assumption of office by General Hertzog's administration.<sup>7</sup> A province cannot interfere with judicial process, as for instance by

<sup>1</sup> *R. v Adam*, [1914] C.P.D. 802, *R. v Maroon*, [1914] E.D.L. 483. For present limitations see *Reloomal v Receiver of Revenue*, [1927] A.D. 401.

<sup>2</sup> *Williams v Johannesburg Municipality*, [1915] T.P.D. 362, *Middelburg Municipality v. Gertzen*, [1914] A.D. 544.

<sup>3</sup> *Maserowitz v. Johannesburg Municipality*, [1914] W.L.D. 139 (by-laws for licensing cycle-dealers).

<sup>4</sup> *Marshall's Township Syndicate v. Johannesburg Consolidated Investments Co.*, [1920] A.C. 420.

<sup>5</sup> *Transvaal Province v Letanka*, [1922] A.D. 102.

<sup>6</sup> *George v Pretoria Municipality*, [1916] T.P.D. 501. But not to compel natives to reside in locations. *Groenewoud & Colyn v. Innesdale Municipality*, [1915] T.P.D. 413.

<sup>7</sup> Ordinance No. 3 of 1925.

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XIV. empowering a magistrate to state a case on a municipal prosecution.<sup>1</sup> It has been ruled also that it is not required by the South Africa Act that members of the councils should, despite the standing orders, take the oath of allegiance which is required of senators and members of the Assembly, and a like claim to be exempt from such an oath has been made by an Administrator of the Transvaal, affording interesting precedents for the attitude adopted by Mr. De Valera in the Free State, which was applauded by republican members of Parliament despite their oaths, though no approval of the attitude of the Irish administration was given by the cautious and diplomatic Prime Minister.

There is obviously much that is unsatisfactory in the system, but the voices against vital change were so strong in 1934 as to secure, as already mentioned, a statutory declaration of policy<sup>2</sup> which denies alteration of powers or abolition or change of boundaries save with the assent of the Provincial Councils. Necessarily this placed on the administration the obligation of securing alleviation of the financial position, and this took the form of dealing with the burden of debt which weighed heavily upon each province. Hence as a result of an enquiry by a Provincial Finance Commission in 1933–4, by Act No. 50 of 1935 the outstanding capital and interest charges on loans granted to the provinces, prior to April 1, 1935, to meet deficits on their revenue accounts were assumed by the Union Government from that date. Further relief was accorded by the National Roads Act, 1935 (No. 42), which imposed on the National Road Board responsibility for the payment of interest and redemption charges upon loans raised prior to

<sup>1</sup> *Germiston Municipality v. Anghern*, [1913] T.P.D. 135.

<sup>2</sup> Act No. 45 of 1934. See p. 68, *ante*.

April 1, 1935, by the provinces for the construction of roads. The Act provides a fund derived from customs duty on petrol and governmental subsidies, whence is being carried out a comprehensive scheme of road construction by provincial authorities at the national cost.

Further, as an administrative reform, there has been established a consultative committee composed of the Administrators and the Executive Committees and presided over by the Minister of the Interior. This body may help to render the system workable. The fact also that the office of Administrator should not be regarded as political as established by General Hertzog on August 1, 1924, in the case of Mr. Hofmeyr in the Transvaal, makes for continuity of administration and is a stabilising influence. But it would be optimistic to regard the system as satisfactory, while of the reform schemes suggested it may fairly be said that they are certain not to be carried into effect, so that criticism would be useless.

By the Act of 1935, above referred to, certain further changes were made in the powers of the provinces. The Union was given responsibility for dealing with noxious weeds, but the Governor-General in Council was authorised to transfer to the provinces power to legislate for irrigation and land settlement schemes, the establishment of labour colonies, the control of indigenous forests and forest plantations, and the expropriation of land for public purposes in a province.

The officers of the provincial services were originally supplied from the existing colonial services on the institution of the Union, but the Executive Committee have now a certain power to appoint new officers. The service is subject to the rule of Section 137, which gives absolute equality to English and Dutch as the languages of the

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Union, and this rule is in a measure one of the grounds for dissatisfaction in Natal, for the great majority of the population there is British, and Dutch, or Afrikaans, which has by a Union Act, No. 8 of 1925, been given rank as Dutch, is in little practical use outside the two districts transferred after the war from the Transvaal.

The utterly dependent position of the provinces is emphasised by the fact that the Union took over all lands with mineral rights from the former colonies and all harbours and railways, as well as liability for the colonial public debts. A certain guarantee to the provinces was contained in the enactment that the control of harbours and railways should be administered on business principles, with due regard to agricultural and industrial development within the Union, and promotion by means of cheap transport of settlement of an industrial and agricultural population in the inland portions of all provinces of the Union, a clause designated by General Smuts as the Magna Charta of the interior. The Union assumed, of course, the obligations of all sorts resting by treaty or agreement on any of the colonies, and the obligation of securing the observance of the agreement of 1909 between the Cape, Natal, and the Transvaal, which gave 30 per cent of the Transvaal traffic to Durban, 20 per cent to the Cape ports, and the balance to Delagoa Bay.<sup>1</sup>

(4) The possibility or, in General Hertzog's view, the certainty of the addition of a fresh province to the Union in the shape of South-West Africa is a factor which it is necessary to consider in connection with the proposal to abolish the provincial system. It would seem impossible to expect that South-West Africa would be willing to enter a

<sup>1</sup> The share of Lourenco Marques under the accord with Portugal of September 11, 1928, is 47½ per cent (Art. XXXII).

unified South Africa, for it has developed with great rapidity a régime of marked autonomy, especially having regard to the fact that it is a mandated territory, over which the Union does not in strictness possess sovereignty. General Smuts, of course, was anxious to secure by the peace treaty incorporation of the territory in the Union, but his own suggestion of the mandatory system for Central Europe recoiled upon him, and all that he could secure was the determination that the mandate, as confirmed by the Council of the League of Nations, should be of the most generous class in its grant of authority, and should permit administration and legislation over the territory as an integral part of the Union. The mandate contains the usual requirements that the mandatory shall further the material and moral well-being of the inhabitants, prohibit the slave trade and the supply of intoxicants to the natives, and their military training save for local defence and internal police, and may not erect naval or military bases. It must regulate the arms and ammunition traffic, and secure free exercise of all forms of worship and freedom of conscience, and must permit the entry and residence of missionaries, nationals of members of the League. An annual report must be rendered to the League, and no change in the terms of the mandate can be made save with the consent of the Council. Any dispute between the Union and any member of the League as to the interpretation or application of the terms of the mandate must be settled in the last resort by the Permanent Court of International Justice.

The position of the Union under the mandate has been discussed by the Permanent Mandates Commission of the League and the Council. The issue has arisen from the reference in the Union Act of 1919 establishing a provisional administration to "State" lands, and the transfer by an

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Act of 1922 of the harbours and railways in full dominion to the Union, to be controlled and managed by the railway administration as part of the system of the Union. More concrete still was the fact that in the treaty between the Union and Portugal in 1925 regarding the Angola boundary the term "sovereignty" was actually used of the position of the Union as regards the territory. What was perhaps more striking, and what formed the ground, in part, for this use of the term, was the discussion by the Appellate Division of the Supreme Court on appeal of the issue<sup>1</sup> whether the Union had such a measure of authority, or in the technical language of Dutch Law *majestas*, over the territory as to justify a charge of treason against one of the natives implicated in the Bondelzwart rising. The judges all agreed that it had the right to punish treason in such circumstances. Innes, C.J., held that the Union was not a sovereign and independent State in the full sense, but that *majestas* operating internally might suffice to found the charge. His view clearly was that, while full external sovereignty did not exist, internal sovereignty was present, and De Villiers and Wessels, JJ., went further and held that sovereignty resided independently in the Union, for it could not reside either in the League of Nations, or the Principal Allied and Associated Powers, or the British Empire. Fortunately, after a rather meaningless exchange of comments, the issue was simplified by the action of the Union in modifying in 1930 by Act No. 9 the terms of the Act of 1922 affecting the railway, without in the least altering its effect. What is clear to all but theorists is that the Union is determined to retain the territory<sup>2</sup> and that the mandate in no wise

<sup>1</sup> *R v. Christian*, [1924] A.D. 101. Cf *J.P.E.*, 1931, pp. 442, 443

<sup>2</sup> Cf Keith, *Letters on Current Imperial and International Problems*, 1935-1936, pp. 169-74, *The King, the Constitution, the Empire, and Foreign Affairs*, 1936-1937, pp. 84, 85, 87, 181.

restricts its action, though it has been rather severely criticised indirectly in regard to the faulty administration which brought about, and the unsatisfactory measures by which the administration repressed, the Bondelzwarts rebellion. The natural claim of Germany to the territory, reasserted by the Chancellor on August 17, 1932, cannot, of course, be denied, but the Union stresses the fact that in 1923 the German Government was induced to recognise that the future of South-West Africa was now bound up with the Union of South Africa, and consented that all German subjects in the territory, unless they expressly refused to do so, might be transformed by the Union into British subjects, as was duly done in 1924, for the Union, though British legislation has not yet accorded this status in the United Kingdom. Unquestionably this weakens the claim of Germany for the restoration of control, and the desire of a section of the German population for autonomy.

On the strength of this agreement the Union gave the territory by Act of 1925, amended in 1927 and 1931, a constitution of great generosity. The model is obviously the provincial system, but free from certain vital limitations of that scheme. The administration is entrusted to an Executive Committee, consisting of the Administrator, appointed by the Governor-General in Council, and four members elected by each Assembly for its duration and until successors are appointed. It administers all matters on which the Assembly may legislate, the Administrator having the casting vote. Proportional voting is prescribed, and members need not be members of the Council, in which they may speak but not vote unless members.

The Executive Committee is augmented by three members selected by the Administrator, with the approval of the Governor-General in Council, to form an Advisory

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Council; one of the three must be an official chosen because of his knowledge of the reasonable wants and wishes of the non-European peoples in the territory. Its functions are to advise the Administrator on issues of principle arising in regard to matters in which he is required to act for the Union, and which are not subject to the Assembly, on the question of assent to or reservation of Ordinances; and any other matters referred to it by the Administrator.

The Legislative Assembly is composed of six members appointed by the Administrator with the Governor-General's assent and twelve elective members. The franchise is male adult suffrage, with twelve months' residence. The duration of the Assembly is now five years, and, while English and Dutch, including Afrikaans, are the official languages, German may be used by members. The powers granted are general, not as in the case of the Provincial Councils narrowly restricted, but they are subject to exceptions. It is necessary to have the consent of the Governor-General before legislation is passed on certain vital issues, including native affairs and taxation, mines and precious stones; railways and harbours; postal and telegraph services; tariffs, customs and excise duties; currency and banking; military organisation, and movements or operations of the South African defence forces; entry of immigrants; and control of the public services as well as the constitution and jurisdiction of courts of justice. The removal of this restriction was duly applied for in 1932 by the local legislature, but requires legislation by the Union to concede it. On the other hand, the Government of the Union has power to comply with the other request then made for the concession of authority over the establishment of a police force; civil aviation; primary or secondary education, establishment of a land bank; and the disposal of Government lands. There

is the usual rule that any appropriation or taxation measure must be recommended by the Administrator, and he may assent to a Bill or reserve it or refer it back to the Assembly for consideration. The Governor-General may allow or disallow or continue consideration of an Ordinance, but a reserved measure is void unless assent is given within a year.

The finance of the territory is controlled in large measure by the Administrator, whose warrant is necessary for issues from the revenue fund, and who, with the aid of the Advisory Council, submits the estimates of expenditure to the Assembly. No issue may be made save of sums appropriated by Ordinance, except that for two months after the end of a financial year the Administrator may authorise payments on the basis of the past year. If the Assembly fails to approve necessary expenditure or impose taxation requisite, the Governor-General may legislate to impose taxation or authorise expenditure by proclamation, thus preventing the Assembly misusing the power of the purse. Moreover, there is a fundamental principle laid down in the Act (Section 44). Nothing in the powers of the Assembly derogates from the full powers of administration and legislation conferred by the mandate and confirmed by the Treaty of Peace and South-West Africa Mandate Act, 1919, and the Governor-General can legislate by proclamation and of course the Union Parliament by Act. The power to issue proclamations may be delegated to the Administrator, but any such proclamation and any Ordinance shall have effect only so far as it is not in conflict with any Proclamation of the Governor-General or Union Act. There is therefore no possible diminution of Union control in law, so that the Union still has the full power to make effective her obligations under the mandate which she is not empowered by the mandate to delegate.

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The Assembly may suggest legislation on topics on which it may not legislate to the Union. Moreover, the Assembly may make representations to the Governor-General in Council, who has the power to modify any part of the Act except Sections 26 and 44, which remain within the control of the Parliament. The Government agreed in principle in 1932 to place German on an official footing of equality with English and Dutch or Afrikaans, but General Smuts deprecated the policy of insisting that officers should be trilingual as resulting in the transfer of all authority into the hands of Germany, though the population is not essentially German. The claim was also made for the early grant of British nationality in the territory and the Union to such settlers as had not already attained it. But the accord reached was never carried out, for quarrels arose between the British and German members, accentuated by the activities of a Nazi organisation and a Hitler Jugend established to spread the principles of National Socialism in the province. Against this movement the Assembly passed a Criminal Law Amendment Ordinance, 1933, and the election in 1934 gave nine elected members in favour of securing entry into the Union as a fifth province. A Royal Commission appointed to report could not reach accord, but on many matters its report was an agreed one. The Commission held unanimously that grave difficulties arose from the fact that the Germans had been unified so effectively that they could not work with democratic institutions, and that finance was in confusion. But, though they agreed that the present form of government was a failure and should be abolished, and that there was no legal obstacle to the government of the mandated territory as a fifth province of the Union subject to the mandate, they could not reach any further accord. Mr. Justice van Zyl recom-

mended placing the territory in the position of a quasi-province but fully under the mandate obligations. Mr. Justice van den Heever thought that the measure of local government given should be repealed, and the area governed by an Administrator on the lines of the plan proposed for the Native Territories in the schedule to the South Africa Act, 1909. Mr. Holloway did not agree with the idea of withholding representative institutions, but also could not see his way to agree with the project of provincial rank. Ultimately the Government decided to let the system operate without substantial change, but to keep the Nazi elements in check. Accordingly, by Proclamation in April 1937, authority was given to the Administrator to declare associations to be political associations, whereupon no member or officer or employee can be of any save British nationality. The Deutsche Bund was thus declared, and thus its foreign membership became invalid. Germany protested vehemently against this action as inconsistent with the promises made in 1923 when she accepted the proposal to naturalise *en masse* the Germans of the territory. On the other hand, it was alleged that the Germans who had become British subjects were glad to be free from the virtual coercion exercised over them by agents of the Nazis. The vital issue, of course, remains the aspirations of the German elements or part of them for evolution into a part of the Reich, and the eagerness of the Union elements to see annexation to the Union. Annexation, however, would clearly need the assent of the League Council. It is significant that, while the Union Government was equally polite and firm in its statement of its case, it did not fail to comment on the steps taken by the German Minister at once to make public the terms of the protest of his Government against the attitude of the Union ministry. Nor was German

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official opinion very favourably impressed with the substance of the Union reply or its attitude towards the obvious intention of the Germans in the territory to maintain in some form or other their impugned activities.

A very important section of the report of the Commission deals in a dispassionate and effective manner with the state of the native population, and throws a rather unsatisfactory light on the manner in which that sacred mission is being executed by the Union.

The present condition of affairs in the area is that the Administrator has sole control under the Union Government, acting as Supreme Chief, and the Secretary as Chief Native Commissioner, while the Magistrates are Native Commissioners, and have under them the superintendents of the native reserves and locations. Of the 263,000 natives more than half live in Ovamboland, the Okavango, and the Caprivi Zipfel, which are outside the police zone, where the Europeans are to be found. In Ovamboland chiefs and councils of headmen govern their people with a Native Commissioner to supervise the maintenance of inter-tribal peace. The Germans had left them alone, and it seems that the situation is satisfactory so far as government is concerned; but education requires assistance and Government co-operation which is not provided. In the Okavango the same rule prevails, but the natives are backward and degenerate, and again nothing is done to lead them to a higher civilisation. In the police area the state of the Hereros, who were reduced to a miserable condition in the revolt of 1904-7, remains deplorable, for they do not welcome even missionaries, and the death-rate in some places exceeds the birth-rate. The Hottentots under civilised rule in the territory have degenerated and are in a depressed condition. The five thousand Bushmen will become extinct

if reserves are not provided. "Where steps are taken for the preservation of scarce species of game, it should never be possible to say that the Europeans had no regard for this extremely interesting and almost extinct branch of the human race" The Bastards, 8500 in number, of mixed origins, have a Council presided over by the magistrate of Rehoboth as their chief, elected to carry out their affairs under their written constitution (*Vaderlike Wet*), which dates from before the German occupation. Their condition also calls for energetic efforts to induce their civilisation as the duty of the mandatory power, and the preoccupations of the Government with problems affecting the European elements seem to forbid due steps being taken in this direction. The position of the natives, as of the Europeans, was made most grave by the drought which ended only at the close of 1933, and the funds which have been spent have not been sufficient to meet the needs of all concerned.

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The Europeans have also grievances against the Union on the score that it introduced over 1200 poor white families whose education and care are an unfair burden on the territory, since many of them were ill-suited, and that it brought in 300 families of shiftless Angola Boers against the wishes of the administration and people, while the German elements resent the fact that the immigration was intended to swamp them. There are complaints of inefficient officers, of the use of railway rates, which are with the railways in the control of the Union, to the disadvantage of the people, and of lack of encouragement to mining.

A serious financial question is involved if any transfer were contemplated. Would the transferee have to bear the whole burden of amounts advanced by the Union for settlement and of late to make good annual deficits? The *prima*

Chapter XIV. *facie* answer is in the affirmative, but there must be borne in mind the fact that the introduction of Union nationals and Angola Boers can hardly be charged fairly to the territory, representing rather legitimate expenditure for its own purposes by the Union. In any case separate records of finance must be maintained in order to satisfy the needs of the mandate.

The Roman Dutch law was introduced into the territory from January 1, 1920, by the Administration of Justice Proclamation, 1919, and it has been ruled<sup>1</sup> that the law so introduced was that of the Cape as modified up to that date by desuetude, custom, judicial decision, and statute, to the supersession of all other law. A certain number of Union Acts have direct application to the territory. Others have been applied by proclamations of the Governor-General or the Administrator. The rest of the law is provided by such proclamations; ordinances of the Legislative Assembly; fragments of German law, *e.g.* that of mining, preserved by proclamations of the Administrator; and such provisions of German law as may cover matters not touched on in the rest of the law. The High Court sits at Windhoek; in civil cases it is constituted of the judge; in criminal causes he sits with two assessors who decide with him the facts, and fix the sentence. Appeal lies to the Appellate Division of the Supreme Court of the Union as from a provincial division. The port and settlement of Walvis Bay is included, though part of Union territory, in the jurisdiction of the Court, for obvious reasons of convenience.

The position of German as a semi-official language is favoured. Members may address the legislature therein, and so in the High Court. The position of the schools is that some

<sup>1</sup> *Tittel v. The Master* (1921), and *Collisons (S.W.) Ltd. v. Kruger and Others* (Year Book, ch. xxvi. § 8).

remain as private receiving a subsidy, most are transferred, and German is the medium of instruction to the end of the elementary course, while children above Standard I receive a daily lesson in an official language chosen by their parents. The Education Proclamation, 1926, allows the use of German as the chief medium of instruction in all standards above VI for children whose home language is German. Since January 1, 1930, the Volks- und Realschule at Swakopmund has been organised as the Swakop High School with German as the medium, pupils being prepared for entrance to the South African and English and also to the German Universities.

One issue of international importance has been decided in the High Court of the Territory in *Verein fur Schutzgebietssanleihen v. Conradie*<sup>1</sup> when it was laid down that the territory was not liable for the pre-mandate debt of the area. The decision was based on the consideration that the former Protectorate of German South-West Africa was not juristically identical with the Mandated Territory. It was pointed out that there was no continuity, but a quite new departure made by the associated and Allied powers under the Treaty of Versailles, 1919. It was further pointed out that to charge a colony with the burden of a loan was merely an administrative device, which could not make such a loan a real burden on the territory when separated from the complex in whose purposes the device was adopted. It is more important to note that in fact there was plainly never any intention among the powers concerned that the territories surrendered by Germany should be burdened by any part of the German debt, whether contracted on their account directly or indirectly.

(5) It is obvious that in view of the comparatively wide

<sup>1</sup> 5 S.A.L.T. 79; Keith, *Journ. Comp. Leg.* xviii. 286.

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range of powers thus enjoyed by the territory some difficulty may be found in fitting it into a reformed scheme of Union Government, especially if the idea of unification is pressed. Moreover, even assuming the assent of Germany<sup>1</sup> and the League of Nations Council to annexation, the Union has further projects of expansion, which may affect the proposal to unify. It failed to secure the addition of Southern Rhodesia, despite the generous offers made by General Smuts, who desired in the difficult times of 1922 to strengthen his supporters in the Union, for on a referendum that territory determined to remain autonomous under responsible government General Hertzog has no doubts that in the future Southern Rhodesia, with Northern Rhodesia in all probability, must form part of the Union, and one of his ministers early suggested that British policy in Central Africa should be made to harmonise with South African ideals regarding the true relations of the native and European races. This Monroe Doctrine for South Africa was naturally repudiated by the British Government, and Southern Rhodesia seems by no means disposed to welcome merger in the predominantly Dutch population of the Union with its compulsory bilingualism in official life and its republican sentiments. The two areas, however, are connected by many vital interests, and in 1930 a new Customs agreement replaced the Customs Union which formerly made them economically one area. This again was altered in 1935 and ratified by Act No. 14. At Ottawa the agreements made by South Africa expressly excluded from the treatment accorded by the agreement of 1930 the parts of the Empire with which they were concluded.

The Union, moreover, hopes to secure the control of

<sup>1</sup> Its necessity is recognised by General Hertzog, *J.P.E.*, 1937, p. 913; return was demanded by Herr Hitler, Nov. 21, 1937.

Basutoland<sup>1</sup> and the protectorates of Swaziland and Bechuanaland. It was indeed proposed, when the South Africa Act, 1909, was passed, that these territories should be handed over at no distant date, and terms for their administration, to secure native interests, were duly imposed in a schedule to the Act, and provision made that these conditions could not be varied save by a reserved Bill of the Union. With the new doctrine of the powers of the Union reservation would be meaningless, and the treatment of natives in the Union has rendered the inhabitants of the territories more and more disinclined to fall under Union rule, nor does it seem that the British Government has any moral right to abandon control of these areas without the assent of the chiefs and people so far as they are capable of expressing their views. The separation of the offices of Governor-General and High Commissioner in 1930 was obviously necessary when the Governor-General became merely the head of the Union Government, since it would have been unwise to place him in a position where the wishes of the Union Government might have conflicted with his duty to the territories, and the British Government now has clear and independent authority.<sup>2</sup>

Difficulties, however, have arisen from the outspoken eagerness of the Union to obtain possession which has elicited a certain resistance on the part of the British Government, which has carefully evaded any assurance to the natives that they will not be handed over despite their objections, but has insisted that they shall be consulted, and that the matter shall be brought before Parliament.

<sup>1</sup> A colony by cession (March 12, 1868), annexed to the Cape (Act No. 12 of 1871), but after unrest disannexed in 1884.

<sup>2</sup> *R v. Crewe; Sekgome, Ex parte*, [1910] 2 K.B. 576, *Sobhuza II. v. Miller and the Swaziland Corporation*, [1926] A.C. 518, *Tshekedi Khama v. Ratshosa*, [1931] A.C. 784.

**Chapter XIV.** It is also clear, and not seriously denied by the Union Government,<sup>1</sup> that, though it has taken power to exercise in the Union any powers of the King in Council, that would not allow it to transfer of its own authority the territories to its control, which must be done by Order in Council at the request of the Union Government recited therein, under the terms of the Royal Executive Functions and Seals Act, 1934. In 1935 the pressure of General Hertzog secured an agreement that, with a view to helping the transfer, the Union might give pecuniary aid to help the territories, of which Basutoland and Bechuanaland are in very poor economic condition, through soil erosion and lack of water respectively, owing to the unwillingness of the British Government to spend money in reasonable amounts on areas which it intends to surrender. But the money was declined in Bechuanaland, as the natives realised that they would thus be selling their independence, and the Union did not press the issue. The difficulty is that to provide safeguards for the natives would be extremely difficult. The Union would resent having to enter into an agreement with the British Government on this head, or to agree to refer disputes about its observance to arbitration by an inter-Imperial tribunal, and Britain in any case would probably not be willing to press native claims against the Union as a matter of inter-Imperial courtesy. The only course therefore seems to be to induce the Union to hold its hand pending such developments in its native policy as may satisfy the natural native fears of the difficulties which might be the result of transfer. The threat is made that the Union has the power to coerce the natives into surrender of their British connection, but it is difficult to suppose that the Union would take this course or that Britain would be so

<sup>1</sup> *J.P.E.*, 1934, pp. 535-7.

mean-spirited as to surrender to coercion what was not right to be given up. Recent developments of Union native policy with the definitive denial of any possible equality of the native, however civilised, with the European have naturally rendered the natives disinclined to enter the Union, while a further reason for hesitation is afforded by the Union doctrine of the divisibility of the Crown and of the right of secession.<sup>1</sup>

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It must be remembered that, if the Bechuanaland Protectorate were to be dealt with, Southern Rhodesia would have a strong claim to urge for the allocation to her control of part of the area, a fact which emphasises the necessity of cautious approach to the problem. Mr. Pirow has again stood out as an exponent of his doctrine that native policy in the regions south of the Sudan, excluding West Africa, must conform to the Union ideal of subordination of native to European interests, and Mr. Grobler's reaction to the mild plea of Lord Noel Buxton in the House of Lords on June 9, 1937, in favour of more just treatment of the natives, is not exactly calculated to reassure native opinion. The exact pledges of the Government are disputed, but they certainly involve the necessity of obtaining the assent of the Imperial Parliament and the full consultation of the natives, which in the opinion of the British Government should be delayed until their views can be ascertained under favourable circumstances.

In the meantime the supreme authority over each territory rests with the High Commissioner for Basutoland, the Bechuanaland Protectorate, and Swaziland, who alone exercises legislative power, assigned to him by Order in

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 75 f., 169 f.; *Letters on Current Imperial and International Problems, 1935-1936*, pp. 66-78; *The King, the Constitution, the Empire, and Foreign Affairs*, pp. 79 ff.; Parl. Pap. Cmd. 4948; *J.P.E.*, 1935, pp. 531 ff.; 1936, pp. 733-5; 1937, pp. 517 ff., 782 ff.

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Council issued under the prerogative in respect of a ceded colony in the case of Basutoland, and under the Foreign Jurisdiction Act, 1890, in the case of Bechuanaland declared a protectorate in 1885, and Swaziland which, being a protectorate of the South African Republic, passed under British protection on the annexation of that territory in 1900. Each territory is administered by a Resident Commissioner under the order of the High Commissioner, and in Basutoland there is an opportunity of learning the views of the natives from the annual session of the National Council or Pitso, of 100 members, 95 nominated by the chiefs, 5 by the Government. Its powers are consultative. The chiefs adjudicate in causes between the natives, subject to appeal to the district commissioners' courts, which deal with all matters where Europeans or Europeans and natives are concerned, unless the European agrees to the chief's jurisdiction, when no appeal lies. In addition to the district commissioners' courts there is a Supreme Court whence appeal lies to the Privy Council, the jurisdiction being exercised by the Resident Commissioner or a Judicial Commissioner. The area, 11,716 square miles, supports 558,091 natives with 1458 Europeans, 1081 coloured, and 363 Asiatics.<sup>1</sup> The law of the Cape up to March 18, 1884, is in force as regards Europeans, the chiefs administer native law and custom.

The Bechuanaland Protectorate is governed under Order in Council of May 9, 1891. Most of the area, 275,000 square miles, is held by or for the natives, but certain areas have been assigned to Europeans, including the Tati district.<sup>2</sup> Native tribunals, reorganised<sup>3</sup> by Proclamation No. 75 of

<sup>1</sup> Census of 1936.

<sup>2</sup> Proclamation No. 2 of 1911. In 1921 Europeans were 1743; natives, 150,185, Asiatics, 52, coloured, 1003; in 1936, 1899, 260,064, 66, 3727.

<sup>3</sup> Partly because of the conditions revealed in *Tshekedi Khama v. Ratshosa*, [1931] A.C. 784, and in the 1933 disturbances.

1934, deal with matters where natives only are concerned, with appeal to the Special Court created in 1912 which exercises the higher jurisdiction and is a court of review, whence appeal lies to the Privy Council.

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There is also the Resident's Court and courts of district commissioners. The law is that of the Cape on June 10, 1891, with native law in the native courts. The control of chiefs over their tribesmen was revised and regulated by Proclamation No. 74 of 1934.

Swaziland is controlled under an Order in Council of 1906, and large areas of land have been assigned to Europeans as a compromise settlement of contending claims of concession holders from the former ruler.<sup>1</sup> The Resident, Commissioner has the aid of an elected advisory European council for European issues, four for the northern, five for the southern area. Under the Swaziland Administration Proclamation of 1907, as amended, the native chiefs exercise civil jurisdiction according to native law and custom in matters affecting natives only. Other issues are dealt with by assistant commissioners or the Special Court created in 1912, of which the Resident Commissioner, his deputy, and the assistant commissioners are members together with an advocate of the Transvaal bar, three members holding sessions without a jury, and exercising unlimited civil and criminal jurisdiction as well as the power of review and appeal.<sup>2</sup> The same judge acts for the three territories, who have thus the advantage of skilled legal knowledge. The Transvaal law was applied by the proclamation of 1907. The area is only 6705 square miles and the 1936 census gives a population of 152,159 Swazis, 2735 Europeans, and 634 coloured, showing a very large increase of Swazis since 1921.

<sup>1</sup> *Sobhuza II. v. Miller and the Swaziland Corporation*, [1926] A.C. 518.

<sup>2</sup> Appeal lies as in the case above to the Privy Council.

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Northern Rhodesia has not departed from the 1930 customs agreement with the Union. The aim of the small European population through its elected members on the legislature is to secure responsible government and unfettered control of the destiny of the natives through union with Southern Rhodesia. Southern Rhodesia has naturally approved<sup>1</sup> this principle as affording an opportunity of far-reaching development and as offering the possibility of maintaining independence from the Union as a distinct territory of the Crown, with full self-government but without the complications of external responsibilities as implied in full Dominion status.

<sup>1</sup> See *J.P.E.*, 1936, pp. 684 ff.; cf. 1931, pp. 569 f.; 1937, p. 783.

## CHAPTER XV

### THE RULE OF LAW AND THE RIGHTS OF THE SUBJECT

TRUE to the British tradition the Dominion constitutions, even those of the federations and the Union, ignore entirely the question of defining the rights to be enjoyed by subjects. The Commonwealth constitution limits both the Commonwealth and the States in various spheres, but it essentially acts as a rule in the sense of allocating the sphere of government to one or the other, not in that of exempting the subject from control by either. The nearest approach to recognition of the principle of a definition of rights is the declaration that the Commonwealth may not establish a religion, nor interfere with the exercise of religion, nor impose a religious test for employment under the Commonwealth. No attempt, however, was made to extend this principle to the States, although in fact they did not contravene any of these principles. The federations and the Union again provide for internal freedom of trade, and the Commonwealth forbids the differential treatment of subjects on the score of residence or non-residence by the States.

(1) The Irish Free State insisted as does now the Constitution of Eire (Articles 40-44) on a full exposition of civil rights. It grants (i) liberty of the person; trial by jury; and inviolability of the domicile; (ii) freedom of conscience and the free profession and practice of religion; (iii) freedom of expression of opinion; (iv) freedom to assemble peaceably and without arms; (v) freedom to form associations for

Chapter XV. purposes not opposed to public morality; and (vi) the right to free elementary education, while (vii) the constitution of 1922 rendered all the lands, mines, minerals, natural resources, including air and water power, franchises and royalties belonging to the State its inalienable property, subject only to non-renewable leases for not more than ninety-nine years. That of 1937 (Article 10) permits permanent alienation. But these rights were inevitably subject to the legislation of the State, and the constitution was alterable by simple Act, so that in fact the liberty of the person, the inviolability of domicile, the freedom to assemble and express opinions and form associations, have been most drastically limited, notably by the Public Safety Act, 1927<sup>1</sup> (which ceased to operate in 1928), and by an Act to amend the constitution (No. 17) which, passed in 1931 to counter the danger arising from the Irish Republican Army, was suspended in operation by Mr. De Valera's Government, only to be revived with drastic force. Apart, however, from legislation the terms used in the constitution of 1922 are significant.<sup>2</sup> The right of personal liberty is inviolable, and no person shall be deprived of it except in accordance with law. The High Court or any judge must examine on habeas corpus any violation of liberty. But "nothing in this Article contained shall be invoked to prohibit, control, or interfere with any act of the military forces of the Irish Free State during the existence of a state of war or armed rebellion". Again, "the jurisdiction of military tribunals shall not be extended or exercised over the civil population save in time of war or armed rebellion, and for acts committed in time of war or armed rebellion, and

<sup>1</sup> *A.-G. v. McBride*, [1928] I R. 451 For the very wide discretion allowed, see *R. (O'Connell) v. Hare Park Camp (Mil. Gov.)*, [1924] 2 I.R. 104.

<sup>2</sup> The provisions of 1937 are more restricted, see p. 564, *post*.

in accordance with the regulations to be prescribed by law. Such jurisdiction shall not be exercised in any area in which all civil courts are open or capable of being held, and no person shall be removed<sup>1</sup> from one area to another for the purpose of creating such jurisdiction" (Art. 70). Chapter XV.

(2) The Irish doctrine implicit in these clauses corresponds well with the traditional rules of martial law in its application to the Dominions. There was controversy over the question whether it should be required, in order to oust martial law jurisdiction, that "all" courts should be open, but the narrower view prevailed, which is in accord with the spirit of the decision in *Marais' Case*.<sup>2</sup> But the Irish courts<sup>3</sup> have held firmly to the view that it is for them to decide at what point they will cease to exercise jurisdiction and allow martial law courts to act, in 1923 hasty legislation was necessary in the Free State because the courts declined to hold that the country was any longer so disturbed as to oust their jurisdiction and permit detention without due process of law. Where the courts hold that a state of war exists they will not intervene, nor is a martial law tribunal a court from which appeal lies.<sup>4</sup> It is merely a piece of executive machinery for the combating of action against the State, with which when it is exerted to the full the courts cannot attempt to interfere.

On the other hand, acts done by such tribunals have no judicial effect. They therefore expose the persons who took

<sup>1</sup> An injunction against removal lay: *O'Boyle v. A.-G.*, [1929] I.R. 558.

<sup>2</sup> [1902] A.C. 109; *Nel v. Minister of Defence*, [1915] E.D.L. 109.

<sup>3</sup> *R. v. Strickland*, [1921] 2 I.R. 317, 333; *R. v. Allen*, [1921] 2 I.R. 241; *R. (O'Brien) v. Minister of Defence*, [1924] 1 I.R. 32; *R. (Childers) v. Adjutant-General of the Provisional Forces*, [1923] 1 I.R. 5, 14, which explains *Egan v. Macready*, [1921] 1 I.R. 265.

<sup>4</sup> *Clifford and O'Sullivan, In re*, [1921] 2 A.C. 570, *Tulonko's Case*, [1907] A.C. 93, 461.

Chapter XV. part in them to liability both civil<sup>1</sup> and criminal if their deeds have exceeded the measures necessary for the suppression of disorder. English opinion wavers between the views that officers and private persons will be held justified in respect of any acts they reasonably do to combat insurrection or wide disorder, and that they can only be excused in respect of necessary acts. The issue is never likely to be decided fully, for the usual plan and the only safe procedure is to obtain an act of indemnity. Not since 1867, when a New Zealand Act of indemnity in respect of the suppression of the Maori rebellion was disallowed as too wide in terms, has any measure been refused assent by the Crown. The Natal Act of 1906, which authorised the courts to regard every act done by military or civil officials in suppressing the native revolt as done in good faith and legal, though private persons might be required to prove good faith, was permitted to stand. In the Union, martial law has been exerted with much effect to deal with disorders on the Rand, in 1912 when British forces were employed, in 1914 and 1922<sup>2</sup> when the defence forces of the Union were compelled to act with great vigour. In all these cases full legislative provision was made to cover the action taken. In 1919, however, when Manitoba was the scene of a serious outburst of unrest, the Dominion and the provincial governments refrained from drastic action, and the citizens of Winnipeg succeeded by self-help in crushing the strike without bloodshed. As a result some rather drastic accessions were made to the criminal code, and the Senate persistently refused to allow the clauses to be deleted from the statute book, as it believes that the country should have effective

<sup>1</sup> *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1, *Hébert v. Martin*, [1931] S.C.R. 145; *Higgins v. Willis*, [1921] 2 I.R. 386, *Wright v. Fitzgerald* (1799), 27 St. Tr. 759.

<sup>2</sup> Indemnity and Trial of Offenders Act, 1922 (No. 6).

safeguards, especially against alien agitators or even British immigrants who seek to excite disaffection to the established state of government in the Dominions. In 1936 it accepted an amendment which allows the common law doctrine of sedition full play in lieu.<sup>1</sup>

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(3) Thus in the Dominions in general it has been necessary by law to make inroads on the rights which can be enjoyed by subjects, and to strengthen the common law provision as against treason, sedition, and like offences. The same causes which evoked the British legislation of 1920 to confer emergency powers on the executive have resulted in the enactment being copied overseas, and in some cases even stronger terms have been included. Much indignation was expressed in New Zealand in 1932 because the ministry not merely adopted the British Act, but omitted the safeguarding clauses against the right to impose compulsory work on members of the public or to introduce any form of military conscription. How far matters have gone in the Free State has already been noted. The legislation of 1931 set up military tribunals with power even to increase penalties provided by law, and exempt from appeal. It authorised the Government to place a ban on associations deemed to be hostile to it, and to make membership a criminal offence; it placed, in certain cases, the onus of establishing innocence on the accused, and it gave power to secure the suppression of the opposition press. No doubt these powers were not likely to be seriously abused, but they

<sup>1</sup> *J.P.E.*, 1936, pp. 778-81. Quebec in 1937 gave dangerously wide powers to the Attorney-General to order arrest and prosecution of persons engaged in subversive activities and to close buildings used for such purposes. It has evoked the formation of a Canadian Civil Liberties Union to fight for the "traditional democratic rights of free speech, free press, free assembly, rights of labour, and other civil rights". A corporative Fascist clerical reaction is clearly under way, hostile, not merely to Communism, but to the Co-operative Commonwealth Federation, and to English-speaking Canadians.

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resulted in refusals of the accused to recognise the courts and their rather drastic punishment. Other legislation protected juries by preventing the making known of their names. As has been said, the measures were denounced by Mr. De Valera's Government and suspended in operation.

But the recrudescence of trouble from the Irish Republican Army, and from elements of the regular Opposition, especially the adherents mustered by the excitable and unreliable General O'Duffy, led to the renewed use of the measure and to violent protests. The courts were kept busy by efforts, very natural, to reduce to some degree the independence of the courts set up under it from the control of the regular courts of law. The excellent principle was laid down that the court would not rule out as inadmissible an action brought, *Blythe and Others v. Attorney-General*,<sup>1</sup> to obtain a declaration that the League of Youth was a lawful association. This action was due to the determination of the Government to declare illegal the Young Ireland Association formed under the auspices of Fine Gael, then the official Opposition, and to obtain from the tribunal an order closing its premises. In the same spirit in *O'Duffy's Case*<sup>2</sup> it insisted that it had power to investigate the interpretation given by the Government to the powers given by the amendment of the constitution. It ruled that the constitutional change was valid and unimpeachable in any court, but that the procedure of the Act must be rigidly followed, and that General O'Duffy had been wrongfully arrested, since his arrest was not on the ground that he was a member of an unlawful association, as the officer who effected it asserted, but on the ground that he intended to make a speech while wearing a blue shirt, an emblem which

<sup>1</sup> [1934] I.R. 266

<sup>2</sup> [1934] I.R. 550. Cf. *The State (O'Duffy) v. Bennett*, [1935] I.R. 70.

the Government was very wisely trying to prevent being worn. The court also exerted its authority by ordering the immediate release of the accused instead of the slower process of issue of the writ, and the Government for its part showed its respect for the law by releasing forthwith the other prisoners whose detention might be illegal.

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On the other hand, the court unhesitatingly refused to hold invalid the proceedings of the Tribunal where they were legal, however contrary to normal rules of law. Thus they upheld a conviction admittedly obtained solely through evidence supplied by the accused himself, who did so under compulsion, it having been made an offence not to give information of one's movements when questioned by an officer of the police.<sup>1</sup> It was admitted that this was a violent departure from the maxim *nemo tenetur seipsum accusare*; but the legislature was not subject to the control of any maxims of law, and unless any law violated the constitution full effect must be accorded to it.

In the same spirit of interest in the rights of the public may be noted the attitude of Mr. Justice Hanna in respect of a claim brought in respect of the killing by special police of a young man in circumstances of great recklessness, when he recommended that prosecution of those responsible should be instituted by the Government, and refused leave to appeal, which, however, was accorded by the Supreme Court.<sup>2</sup> It may be noted that in Northern Ireland also the extent of the powers exercised autocratically by the ministry in the matter of arrest and detention without trial is excessive and dangerous to liberty.

The necessity of using exceptional authority in Ireland

<sup>1</sup> *The State (McCarthy) v. Lennon*, [1936] I R. 485.

<sup>2</sup> The appeal was dismissed, £300 damages being allowed, *Irish Review*, 1937, p. 45. A serious case of failure to punish a crime against a woman, incited by a parish priest, is reported in *Manchester Guardian*, Nov. 19, 1937.

**Chapter XV.** appears conspicuously in the Constitution of Éire.<sup>1</sup> Special courts may be established to try offences where the ordinary courts are inadequate for the preservation of peace and order. Military tribunals may be set up not merely to try offences by persons subject to military law, but also to deal with a state of war or armed rebellion. Courts martial may deal with offences by members of the defence forces not on active service. Moreover, by a very remarkable provision, it is enacted that the rule that judges shall be independent in the exercise of their judicial functions and subject only to the constitution and the law shall not apply to courts-martial or to special tribunals. Another remarkable provision<sup>2</sup> is that nothing in the constitution may be invoked to invalidate any law enacted by the Oireachtas, if expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in pursuance of any such law. Very unsatisfactory is the fact that, after providing for the liberty of the subject and the issue of the writ of habeas corpus, it is expressly added<sup>3</sup> that these provisions shall not be invoked to prohibit, control, or interfere with any act of the defence forces during a state of war or armed rebellion. It was also unfortunately proposed in the draft constitution that the High Court by which the writ of habeas corpus falls to be issued could not question the validity of any law, so that it might be precluded from intervening to vindicate liberty pending the determination of that question by proceedings before the Supreme Court, which alone was given jurisdiction in these issues; but that project was dropped.

The use of special courts, of course, is not peculiar to

<sup>1</sup> Art. 38. The Constitution (Art. 48) abrogates the Act of 1931.

<sup>2</sup> Art. 28 (3) (3).

<sup>3</sup> Art. 40 (4).

Ireland. They have on occasion been set up in South Africa for trial of rebellion, as in Dinizulu's case in Natal. But in the Union under the Riotous Assemblies Act, 1914, there is standing provision for the constitution of such courts, in order to prevent the defeating of the ends of justice by jury trial in cases of contravention of the law regarding riotous gatherings, the dissemination of seditious propaganda, and the use of violence in industrial disputes. Two or three judges constitute the court which is specially set up on each occasion.<sup>1</sup>

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In the Union of South Africa alone among the Dominions is there wholesale departure from the English doctrine of the equality of subjects before the law. As a result of the social conditions and racial feeling in that territory, it is felt necessary, in the interests of the Europeans, to place all possible barriers in the way of the attainment of a higher standard of life and civilisation by the natives, lest they should be able to compete with Europeans in any way, their functions in regard to Europeans being reduced to those of acting in inferior capacities in urban areas and in the country districts. The violation of equality has its perfect expression in the pass laws which are in force throughout the Union except the Cape, exclusive of the Transkei. The requirement of a pass imposes grave disabilities on the natives, who are constantly being punished for violation of complex regulations which they do not understand, little justice being shown by the police, whose habit of maltreatment of natives is encouraged by the prejudice felt against inflicting any punishment on persons injuring natives, while the court proceedings are rough and ready.<sup>2</sup> The

<sup>1</sup> Act No. 46 of 1935, s. 35, limits the use of such courts to treason, sedition, and public violence.

<sup>2</sup> E. H. Brookes, *Coming of Age*, pp. 380-94.

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Native Service Contract Act, 1932, imposes additional disabilities on the natives of the Transvaal and Natal by prohibiting their employment in many cases otherwise than under a labour contract with an employer, which may be enforced by criminal penalties, and by providing for the making of like contracts by natives for children between age ten and eighteen.<sup>1</sup> The general rule in labour issues is that matters which are merely dealt with as matters of civil agreement as regards Europeans are made criminal as regards natives, it is significant of the deterioration of the attitude even of the British Government on these subjects that, on June 9, 1937, the Marquis of Dufferin arose to defend the iniquities of the Southern Rhodesian legislation<sup>2</sup> on the ground that the pass laws were necessary to prevent natives coming to towns and committing crimes. In the Union provision has definitely been made to forbid natives to exercise skilled labour occupations, despite the fact that in many cases they are fully capable of performing such work. The tendency to legal repression is plainly growing in strength in accordance with the overwhelming weight of European opinion, and the extinction of the former form of the Cape native franchise has greatly facilitated the destruction of any remnant of native rights. The creation of a Natives Representative Council was to have preluded the cessation of legislation on native issues without submission to it for advice.<sup>3</sup> But in 1937 the Native Laws Amendment Bill, which adds seriously to native disabilities and gives arbitrary power to the executive to remove natives from urban areas, and send them to the reserves which are already unable to offer them support, with the

<sup>1</sup> Sir J. Rose-Innes, Sir C. Tredgold, Mr. Duncan, Mr. Hofmeyr and others criticised this most unjust measure Cf *Round Table*, xxii. 658-72.

<sup>2</sup> Natives Registration Act, 1936 (*J.P.E.*, 1936, pp. 689 ff.).

<sup>3</sup> *J.P.E.*, 1936, pp. 631 ff.

alternative of working for farmers at nominal wages under penal clauses as contract labourers, was carried through the Assembly without the slightest regard to General Smuts' categorical assurances of the preceding year. It is not surprising that native opinion should deeply resent the determination to use the natives solely as instruments of European well-being without regard to their interests.<sup>1</sup>

In South Africa, therefore, the most recent limitations of freedom have been connected with the determination to repress the growth of native unrest. The action taken in 1930 was the necessary concomitant of the legislation intended to widen the European franchise, and, in the words of a Dutch pastor, to secure thus aid in keeping the natives in their place of inferiority in State and Church. An Act, No. 27 of 1914, gave wide powers to any magistrate to forbid public meetings, but in 1930 this was felt insufficient on the ground that it did not authorise him to forbid a meeting which, though likely to excite racial feeling, was not expected to lead to deeds of violence, and that it did not prevent an agitator from attending a meeting and inflaming passions by his address. The Parliament therefore gave power, by Act No. 19 of 1930, to the Minister of Justice to forbid the holding of any meeting in any defined area for a defined period and to forbid any person from attending that meeting, if he believes that hostility might be engendered between the European and non-European inhabitants. Moreover, the Governor-General in Council may prohibit the dissemination of publications likely to engender such feeling, though an appeal to the courts is given as to whether any

<sup>1</sup> Some chance of justice to natives in causes where Europeans and they are concerned may be secured, if the power of the Minister of Justice to order trial without a jury (Act No. 46 of 1935, s. 36) is wisely used. But at the first meeting of the Council in Dec. 1937 Mr. Grobler's hostility to native aspirations was marked.

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publication would naturally have such a result. The minister may also prohibit the presence of a person in any defined area if he thinks his presence there may engender such hostility. Contravention of the Act is a crime involving the possibility of deportation in the case of persons born outside the Union. Necessary as the measure may be from the point of view of maintaining racial supremacy, it is impossible not to recognise the force of the arguments brought against it by the Opposition as a deliberate effort to prevent the expression of native or coloured opinion on issues vitally affecting them. Whether such suppression is the wisest line of policy is a matter on which only experience can render an opinion of value. But the whole measure is one more sign that growing social unrest throughout the Dominions is increasing the difficulty of recognising as widely as formerly the liberty of the subject. Freedom of speech is always regulated by the law of libel, and in the case of attacks on the Government the crime of seditious libel<sup>1</sup> in one form or another is recognised in all the jurisdictions. The Commonwealth of Australia was compelled by the violence of the strikes in the ports to resort to drastic legislation, part of which, involving the deportation of persons on the determination of a minister, was ruled by the High Court to be impossible of support in law.<sup>2</sup>

It is of course a maxim of English law that all subjects are bound to assist the authorities in suppressing disorder,

<sup>1</sup> The Montreal trials (*R. v. Engdahl et al.*, *R. v. Chalmers et al.*) in 1931 (*Can. Bar Review*, ix. 756-61) show the risk from this source to individual liberty. The Irish censorship of literature in a narrowly puritanic spirit (Act No. 21 of 1929) is paralleled by the banning of S. Cloete's *Turning Wheels* in South Africa in Dec. 1937.

<sup>2</sup> *Walsh and Johnson, In re; Yates, Ex parte* (1925), 37 C.L.R. 26. The Crimes Act, 1932 allows deportation of members of unlawful associations, declared so by the High Court or a State Supreme Court, their arrest without warrant, and disqualification from voting.

and the same doctrine is found in Quebec and the Union of South Africa. In the Irish Free State a Volunteer Division of the State Army once constituted itself as a safeguard for the Opposition. All the more is it incumbent on officers of the Crown to render mutual aid, and, while Imperial military forces are normally not now present in the Dominions, naval forces if available are at the disposal of Dominion Governments to repress disorder beyond the power of local means to subdue. In the 1932 riots in New Zealand local volunteers, naval ratings, and police co-operated to repress senseless and destructive manifestations by strikers, and at the Governor's request the *Dragon* was sent to Newfoundland to counter the rioting against Sir R. Squires.

In the case of the Commonwealth it is definitely enacted that it shall protect the States against invasion, and on the application of the executive Government of the State, against domestic violence. The obligation is clear in law, but it is one of imperfect obligation manifestly not being suited for legal enforcement, and in point of fact the Commonwealth has asserted its right to consider whether or not in fact the circumstances demand intervention by armed force. In the case of Canada the use of the military forces can be secured from the Dominion through the application of the Province backed by its Attorney-General, but that the provinces shall not rely unduly on this source of strength and therefore neglect their duty of securing adequate police forces, the rule is enforced that the province must undertake to pay the cost of the force employed. It has, however, been ruled in Canada that a promise cannot be enforced unless provincial legislation authorises payment.<sup>1</sup>

(4) The subject is protected as in the United Kingdom

<sup>1</sup> *Troops in Cape Breton Reference*, [1930] S.C.R. 554.

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against illegal taxation by the action of the courts. They have decided sometimes as in England that the mere passing of resolutions by one house of Parliament is no ground for raising money from the taxpayer,<sup>1</sup> so that it has been necessary to provide by legislation for the raising of customs duties before the legislation imposing the whole tariff is finally adjusted. It is no doubt the case that, if the illegal legislation of Tasmania had been placed in 1925 before the courts, it would have been held invalid so far as it imposed taxation. As regards the right of the executive to raise money by attaching conditions of payment for licences to do acts which may be performed only under licence, the Dominion courts<sup>2</sup> have ruled as in England that this is taxation without Parliamentary authority, unless the power to license definitely includes that to levy a sum for licensing. The right of the subject to prevent expenditure without due Parliamentary sanction is less easy to enforce, for no individual<sup>3</sup> has a *locus standi* in the matter; but it is clear that, while an injunction against expenditure may not be obtainable, yet the moneys illegally paid may prove to be recoverable from the payee in a suitable form of action.<sup>4</sup> The taxpayer is also protected by the rule that no ministry can conclude a contract which will bind Parliament to provide money; the implication in any contract is that it is subject to Parliamentary approval if it involves pay-

<sup>1</sup> *Stevenson v. R.* (1865), 2 W.W. & A'BL. 143, contrast for the Commonwealth *Colonial Sugar Refining Co. v. Irving*, [1906] A.C. 360.

<sup>2</sup> *Commonwealth v. Colonial Combing, etc. Co.* (1922), 31 C.L.R. 421; *A.-G. v. Wilts United Dairies Ltd.* (1922), 91 L.J.K.B. 897; *Brocklebank Ltd. v. R.*, [1925] 1 K.B. 52.

<sup>3</sup> *Dalrymple v. Colonial Treasurer*, [1910] T.P. 272. So the Sugar agreement between the Commonwealth and Queensland cannot be impugned by an individual: *Anderson v. Commonwealth* (1932), 47 C.L.R. 50.

<sup>4</sup> *Auckland Harbour Board v. R.*, [1924] A.C. 318, *Mackay v. A.-G. for British Columbia*, [1922] 1 A.C. 457.

ments,<sup>1</sup> and in the Commonwealth it has even been held very drastically by the High Court that it is not enough to validate a contract that later on an appropriation is passed by the legislature.<sup>2</sup> But a very much more generous view of the rights of the executive has been taken in *New South Wales v. Bardolph*<sup>3</sup> which involved the right of a minister to make a contract for advertising of considerable duration and of dubious value, suggestive of its origin in political rather than purely administrative reasons. The judgment in that case probably goes too far in some of its dicta, but in the actual circumstances it may have been sound. It is quite clear that English law will not allow the control of Parliament to be evaded, and the law of Australia must in this regard in the absence of legislation be assumed to be in accord with English law.

Respect for private property is enforced throughout the Dominions, though with varying degrees of rigidity and naturally with less dogmatism than in Britain. The most magnificent principles on this head are those borrowed from the Catholic Church and enshrined with much else of interest in the Constitution of Éire. Man by virtue of his rational being has the natural right antecedent to positive law to the private ownership of external goods.<sup>4</sup> The State therefore guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property. Still, it may delimit by law the exercise of these rights with a view to

<sup>1</sup> *Commercial Cable Co. v. Newfoundland Government*, [1916] 2 A.C. 610; *Rayner v. The King*, [1930] N.Z.L.R. 441; *Troops in Cape Breton Reference*, [1930] S.C.R. 554.

<sup>2</sup> *Commonwealth v. Colonial Ammunition Co* (1923), 34 C.L.R. 198, cf. *Kidman v. Commonwealth* (1925), 37 C.L.R. 233.

<sup>3</sup> (1935), 52 C.L.R. 455.

<sup>4</sup> Art. 43 (1) and (2).

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(5) Great importance attaches in the eyes of many judges to the maintenance of the jury system not merely in criminal but also in civil causes. In Australia there has been some rather strange variation of practice as between the several States. New South Wales has the criminal jury of twelve with unanimity, and a civil jury of four, three being sufficient to decide after six hours; hardly any cases in the Supreme Court are decided without juries. Victoria has the criminal jury of twelve with unanimity, and in a minority of cases a civil jury of twelve or six with possibility of a majority decision. South Australia has the criminal jury of twelve, but accepts, save in murder, a majority of ten, but since 1927 has abandoned the civil jury for all practical purposes. Queensland has the criminal jury of twelve with

<sup>1</sup> Art. 42.

<sup>2</sup> Art. 41 (1) and (2).

<sup>3</sup> Art. 41 (3).

<sup>4</sup> Art. 16 (1) as amended.

unanimity and a civil jury of four, with a majority verdict by agreement only. Unlike the other States it has no property qualification for jurors, but women must apply, and only 52 had applied from 1923 to 1936. Most civil cases are heard without juries. Western Australia has the criminal jury of twelve with unanimity, and rarely a civil jury of six or twelve with the possibility of a majority verdict is employed. In Tasmanian criminal trials a majority of ten jurors can be taken after two hours, manifestly too brief a time. Civil juries vary from three to seven with possibility of majority verdicts, but are seldom used.

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In the Commonwealth the provision of the constitution that trials on indictment for offences against Commonwealth law shall be by jury means little, since there is no requirement that trials shall be on indictment, and it has been ruled in *Bernasconi's Case*<sup>1</sup> that the provision of Section 80 of the constitution does not apply to the territories. In Papua and the mandated territory of New Guinea the only juries are those of four used in cases of trials for crimes punishable with death of persons of European descent. In the Northern Territory trial by jury of twelve is necessary for offences punishable with death, but a majority of nine is allowed; in civil causes the judge may order jury trial. In criminal cases in the Seat of Government a criminal jury of twelve is required under the Juries Ordinance, 1936, while no jury exists in civil cases. In Norfolk Island there is no civil jury. In criminal cases generally the judge and seven elders try, a majority of five is accepted; in capital cases a grand jury of thirteen elders is summoned, of whom seven may find a true bill of indictment, when trial takes place by twelve with unanimity required.

There seems to be strong reason to hold that jury trial in

<sup>1</sup> (1915), 19 C.L.R. 629.

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civil cases has the advantage of securing easily final results, and that in criminal cases it affords greater security to the public. The opinion of Lord Atkin<sup>1</sup> and the Lord Chief Justice<sup>2</sup> may be adduced in support of juries and unanimity; but there are critics, such as Mr. R. G. Menzies, Attorney-General of the Commonwealth of Australia, who in 1936 agreed with the criminal jury and unanimity, but denounced the civil jury as "incompetent, unessential, and corrupt", and declared that the verdict of a jury in such cases was often wholly unfair, while to appeal against it was useless, illustrating his view by the case of *T. J. Ryan v. The Argus*,<sup>3</sup> which on retrial was decided simply on the general opinion the jurors held of that well-known politician.

Jury trial is also respected in Canada, in New Zealand, and the Union of South Africa, where the jury<sup>4</sup> is one of the many points borrowed from English law. The Irish Free State includes as a constitutional principle the employment of jury trial in the case of other than petty offences, and those assigned to special courts and courts-martial, and the Constitution of Eire<sup>5</sup> adopts the same attitude. Unfortunately these are very serious exceptions. It was found necessary also at one time in jury trials to accept majority verdicts. The same tendency is to be found even in Canada, which in legal matters is conservative. Saskatchewan in 1935 (c. 22) reduced civil juries to six in number with provision for a verdict by five, and Canada has likewise

<sup>1</sup> *Ford v. Blurton* (1922), 38 T.L.R. 805.

<sup>2</sup> *R. v. Armstrong*, [1922] 2 K.B. at p. 568.

<sup>3</sup> *Aust. Law Journal*, x. Suppl. pp. 74, 75.

<sup>4</sup> *De facto* women juries are unknown, and mixed juries are not contemplated. Women can claim to be enrolled, but are not placed on the list otherwise; Act No 20 of 1931. The Irish Free State also is not in favour of females as jurors Under Union Act No 46 of 1935 jurors must be Union nationals, with an income qualification of £250 a year. There is no civil jury.

<sup>5</sup> Art. 39. Courts-Martial act in case of war or rebellion against civilians.

amended the rules of criminal procedure in so far as that <sup>Chapter</sup>  
province is concerned. Quebec,<sup>1</sup> generally conservative, <sup>XV.</sup>  
abolished the obsolete grand jury in 1933 (c. 67).

<sup>1</sup> As in British Columbia, Saskatchewan, Alberta, and Manitoba: *Brodie v. R.*, [1936] S.C.R. 188. Newfoundland keeps it, but not Australia and New Zealand.

## CHAPTER XVI

### THE FOREIGN RELATIONS OF THE DOMINIONS

Chapter XVI. WE have already seen that the Dominions—excluding Newfoundland—are for many purposes sovereign international States, though of a special kind in view of the integral relations which they still retain with the United Kingdom. But for most purposes they are glad to avail themselves of the British services as the most effective and cheapest method of dealing with international affairs, and their own activity is minor in character.

(1) Foreign relations in each Dominion are dealt with by a special Department, the tendency being for the Prime Minister to keep the issues in his own hands.<sup>1</sup> The reason for this is that the Prime Minister is specially charged with Imperial relations as a member of the Imperial Conference, and that it is in foreign affairs that such relations are constant and pressing. The control exercised over the ministry by Parliament is perhaps less close than in domestic issues. The latter are vital to members and with them they are familiar. But foreign affairs are studied by only a handful of politicians, and the Commonwealth Parliament has shown a most remarkable indifference to all such questions. More interest exists in Canada, as a result of proximity to the United States and greater touch with European currents of opinion; but in the other Dominions save the Irish Free State external affairs bulk little in the popular estimation.

<sup>1</sup> Mr. Hughes was given the portfolio in 1937 in the Commonwealth.

But, as in the United Kingdom, since the treaties of peace were submitted for the approval of Parliament before ratification, the tendency has been for every important treaty to be submitted to the Dominion Parliaments for approval. There is no absolute rule. In minor matters the executive Government can act, if it does not impose any financial burden or positive obligation affecting existing law. If a charge or any change of law is necessary,<sup>1</sup> the Dominion Parliament must be asked to make that change before assent to ratification is expressed.<sup>2</sup> In Canada the demand that Parliament should be consulted on all treaties has been raised, but not seriously pressed. On the other hand, it has been insisted repeatedly that anything which might involve the Dominion in risk of war must go before Parliament. In the same way the doctrine is accepted by both sides in Canada that a declaration of war ought, if not preceded by Parliamentary approval, to mean that Parliament shall be summoned, and its assent secured before any active assistance is given to the Empire.<sup>3</sup> The much more drastic question whether there should be a referendum in the form of a general election on the subject as proposed by Mr. Meighen<sup>4</sup> has never been answered. Clearly it would mean in practice that Canada could not be expected to render any effective aid in war. The Irish Free State constitution, which negated implication in active hostilities without the assent of Parliament except in case of invasion was content to leave the issue to Parliament without suggest-

<sup>1</sup> Cf. Constitution of Éire, Art. 29 (5).

<sup>2</sup> If legislation is not essential, only the lower house need assent; Keith, *Journ. Comp. Leg.* xi 252, 253; xii 295, 296. For the need of legislation to alter positive law, see p. 341, *ante*. Cf. *Meyer v. Payntor* (1920), 27 C.L.R. 436, 441.

<sup>3</sup> This was reasserted with agreement on all sides in 1937 when a motion in favour of neutrality in any war was rejected, *J.P.E.*, 1937, pp. 302-9.

<sup>4</sup> See p. 613, *post*. In Jan. 1938 a like proposal was rejected in the United States House of Representatives.

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ing a referendum. The Constitution of Éire<sup>1</sup> forbids declaration of war or participation therein without the assent of the Dáil, save in case of invasion, when the Dáil must be summoned forthwith.

In this condition of public indifference to any foreign issues which do not immediately touch the interests of the Dominion, it is inevitable that Dominion foreign policy should be mainly negative, or should consist in accepting the views of the British Government, where these do not mean involving the Dominions in any responsibilities. The attitude of the Dominions at the Imperial Conference of 1926 to the Locarno Pacts illustrates admirably the real position; the Governments applauded the step taken which engaged the British Government in the obligation to defend the frontier between France, Belgium, and Germany, but exempted the Dominions from obligation unless they deliberately accepted it, but not one Dominion actually did accept the obligation. Similarly the Dominions adopted a purely negative attitude to the ingenious plan of 1924 for strengthening the Covenant of the League so as to avoid the possibility of war.<sup>2</sup> One and all feared that some obligation might be involved, and the idea that the immigration issue might be brought into international discussion completed their determination to oppose. Even in the minor case of the grant of financial assistance to any power unjustly attacked, Canada would not dream of accepting, though Australia and the Irish Free State were more generous. In the great disarmament conferences at Washington in 1921 and at London in 1930 and 1936, as well as in the efforts made at Geneva on the same account, the Dominions have been content to act formally in accordance with the British lead; the attraction to save their resources

<sup>1</sup> Art. 28 (3).      <sup>2</sup> Parl. Pap. Cmd. 2458 (1925). Cf. *J.P.E.*, 1925, p. 593.

by allowing armaments to be reduced to a nominal basis has irresistibly led to acceptance of the view that the British Government and public should bear the burden of safeguarding the commerce of the Empire and the integrity of all British territory, though New Zealand has generously contributed to the share of the Dominions in the Singapore base project, which of course is virtually devised for the Dominions. In reparations at The Hague in 1930 and at Lausanne in 1932 the leadership has been British, and the Union alone was able to refuse the offer of British concessions as to repayment of war debt in 1931-2, since repaid in full.

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(2) Direct diplomatic representation achieved by the Irish Free State in Washington in 1924 has been extended by the Free State to Paris, to Berlin, and to the Vatican City, while in 1931 arrangements were made for appointing a minister to Belgium, the office to be combined with that of Minister to France. An envoy has also been sent to Spain (1935).<sup>1</sup> The Dominion of Canada decided on a similar course in 1926, and proceeded to appoint ministers to Paris and Washington; this was followed by a like appointment to Tokyo; the Union of South Africa first made appointments to The Hague, Rome, and Washington; it is now represented in Paris, Brussels, Germany, Stockholm, and Lisbon.<sup>2</sup> In all cases the points selected are deemed of special importance on political and economic grounds, and the extension of representation in all cases is dependent on the decision whether the cost involved is likely to be repaid by the results achieved. The foreign Governments concerned have usually reciprocated; the United States in 1927 sent ministers

<sup>1</sup> On his position in 1937 during the Civil War see Mr. De Valera, *J P E*, 1937, pp 440 f.

<sup>2</sup> The Minister at The Hague is accredited to Brussels, that at Paris to Lisbon, that at Berlin to Stockholm. There are Commercial Counsellors for North and South Europe at the Berlin and Rome legations.

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to Ottawa and Dublin, France in 1928 despatched an envoy to Ottawa; Tokyo followed suit in 1929, and in that and the following year the Netherlands, the United States, and Italy sent ministers to the Union; a Papal Nuncio reached Dublin in 1930 to be followed later in the year by ministers from France and Germany, which later sent envoys to the Union. Canada, the Free State, and the Union maintain permanent representation at Geneva.

Consular representation has been slower of development, the British consular service being sufficient for most needs. Friction over the recognition of Irish Free State passports which did not state that the bearer was anything save a citizen of the Free State—not therefore necessarily a British subject—helped to bring about in 1930 the creation by the Irish Free State of a Consul-General to the United States, and in 1931 Consuls were placed under his control at New York and Boston as ports of entry of immigrants. In 1932 an appointment was made at Paris. The Union in 1930 marked its sense of the closeness of its relations with Portuguese East Africa by the appointment of a Consul-General there, and, in view of the Convention of 1928 regarding railway rates and the supply of native labour, the interests of the territories are inextricably interwoven. It has a Consul-General at Hamburg, and several Trade Commissioners, who are used by all the Dominions, but without consular rank.

In arranging diplomatic representation the normal<sup>1</sup> procedure is for the British Government to ascertain that the foreign power concerned is willing to accept, and is prepared in return to accredit an envoy, for naturally it is a rather undignified position for a Dominion to be represented at a

<sup>1</sup> Italy in 1937 took the initiative in accrediting a minister to Éire; *Dáil Debates*, lxvii. 729 f., 797. See Preface.

Court which regards it of too small account to reciprocate representation. The minister is then accredited by the King by a letter of credence,<sup>1</sup> which is normally issued through the Foreign Secretary, but in the Irish Free State and the Union of South Africa is issued by the Ministry of External Affairs. The minister is then received in the foreign State in the same manner as ministers from other countries. Conversely the letter of credence from a foreign State is addressed to the King, but is presented to the Governor-General as representing the King personally. In the Free State, however, the President of the Council received the diplomats Foreign Ministers receive in the Dominions the same immunities as are accorded in the United Kingdom under English views of diplomatic privileges under international law.<sup>2</sup> These, of course, are denied to persons not recognised as diplomatic envoys, such as trade representatives of Russia, so in the United Kingdom it required a special agreement to accord diplomatic status to such representatives, and the present agreement definitely limits the extent of privilege accorded.<sup>3</sup>

The relation between the British representative at a foreign Court and Dominion representatives is parallel to that of the British and Dominion Governments. The latter are bound to consult one another in treaty matters, and accordingly the representatives must keep in touch, though on a basis of complete equality. It is significant that when the incident of the sinking of the vessel *I'm Alone* took place in 1929 both the British Ambassador and the Canadian Minister took up the matter with the United States, until it became clear that Canada was essentially interested owing

<sup>1</sup> For a specimen see Keith, *Speeches and Documents on the British Dominions, 1918-1931*, pp. 445, 447.

<sup>2</sup> For the Union Acts have been passed, Nos. 9 of 1932, 19 of 1934.

<sup>3</sup> Agreement of 1934 (Art. 5).

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to the vessel being Canadian, and then the minister assumed the burden of negotiation, the British Government being duly informed, as the incident involves issues of importance to all British subjects and shipping. It may be noted, with regard to the many attacks made in Canada in pre-war days on the slow progress of British diplomacy, that the incident was only settled in 1935.<sup>1</sup> Canada is not the only Dominion to learn by experience that diplomacy is not a matter in which any power can expect to have its own way. There seems no doubt that the system of free intercourse and consultation is far more calculated to enhance the value of Dominion representation than would be an effort to remain aloof. No Dominion can seriously compare as yet with the United Kingdom as a great force in international politics.

Where the Dominions do not care to be represented, they may use British diplomatic machinery.<sup>2</sup> This can be done through the Foreign Office<sup>3</sup> or direct by requests to the legations and embassies. In the latter case the British representative is now permitted, in accordance with the request of the Dominions at the Imperial Conference of 1930, to act without prior authorisation from the Foreign Secretary in matters of routine character and minor importance. In other issues, and of course where the proposed action seems to affect British interests, he must take the instructions of the Foreign Office, to which he is responsible for due safeguarding of the primary duty of securing British interests.

<sup>1</sup> A fresh incident took place in 1931, the master of the *Josephine K.* being killed by a shot from a United States cutter, allegedly in the 12-mile limit from the American coast, while engaged in liquor traffic. Canada protested; *Canadian Annual Review*, 1930-1, pp. 362, 363.

<sup>2</sup> Australia is of opinion that the appointment of liaison officers at British Embassies is desirable, and made the first appointment in 1937 to Washington.

<sup>3</sup> E.g. renewal of arbitration convention with Iceland for Canada, Australia, and New Zealand, March 22, 1937; Cmd. 5448.

But the legations and the consular service are under clear instructions to assist as far as possible Dominions in their political and economic interests.

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A very important point was decided in the case of the presentation of the claims in respect of British subjects arising from the sinking of the ship *I'm Alone*.<sup>1</sup> The United States at the investigation inclined to the view that the Canadian Government was not entitled to press claims in respect of British nationals, not being Canadian Nationals. That elicited from the British Government a formal statement that "the question as to which of His Majesty's Governments should present a claim on behalf of an individual subject of His Majesty is one for settlement between the Governments of His Majesty concerned; and that no foreign Government is entitled to question the authority of one of His Majesty's Governments to present a claim on behalf of a particular subject of His Majesty". The fact that it was convenient for Canada to deal with the matter was recognised, and the result of the handling of the issue by Canada would be regarded by the United Kingdom as constituting a final settlement of any claims which might be made in that connection on behalf of the individuals concerned.<sup>2</sup>

(3) The most formal, if not necessarily the most important, part of the duties of Dominion representatives abroad is to negotiate and conclude treaties. The mode of procedure in these cases has already been indicated. The normal course is to use Foreign Office machinery, and to secure a full power to sign from the King under the Great Seal of the Realm, but in the case of the Free State and the

<sup>1</sup> See *British Year Book of International Law*, 1936, pp 82 ff

<sup>2</sup> Cf the principle of inter-Imperial helpfulness inculcated by the British Government at the Imperial Conference, 1937; Parl Pap Cmd 5482, pp 24, 25.

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Union the Irish and Union seals are used. Ratification is expressed in like manner, either by the King with the use of the Great Seal or by His Majesty with the use of the Irish or Union seal. But in either case the responsibility for advising ratification is the same, and rests on the Dominion Government. That Government again is formally responsible for the decision of the question whether or not the matter is one which can be disposed of without requiring the formal assent of Parliament, or whether it must be so approved. It is, of course, the Dominion Government which must know whether there is any legal obstacle to giving effect to the treaty by executive action<sup>1</sup> which necessitates legislation, or whether the matter is so important that it must ask Parliament for formal approval. It is interesting to note that in the controversy over the financial issues between Mr. De Valera and the British Government stress was laid by the former on the view that Parliament had never been asked to approve the payments made or the agreements entered into in 1923 and 1926, and by the latter on the undoubted fact of the discussions of the agreements in Parliament and the upholding of the action of the Government by Dáil Eireann.

Apart from the activity of the Dominion representatives at foreign Courts, treaties have constantly to be negotiated, signed, and ratified for the Dominions by envoys specially appointed, the procedure in the issue of the necessary instruments being as described above. Thus the treaty between the Union and Germany was signed at Pretoria on September 1, 1928, by a Union minister under special authority, and on September 11 was signed there the Convention between the Union and Portugal regarding

<sup>1</sup> Cf the Commonwealth action on the Belgian agreement of 1934, the first negotiated by an Australian minister, *J.P.E.*, 1935, pp. 77-82.

relations with Mozambique. Or the matter, if not too formal, may be arranged by an exchange of notes between the Prime Minister and the Consul-General, as in the case of the *modus vivendi* between New Zealand and Japan of July 24, 1928, or between the External Department of the Union and the German Consul-General in 1930 as to registration of patents, etc. Frequently the business is managed through the British minister to the foreign power specially instructed for the purpose, as in the case of the extradition convention of January 20, 1932, with Portugal.

There are, of course, much more important matters in which the Dominions are concerned. They now are parties to the great international treaties, and for that purpose the procedure now adopted is the signature of these treaties by delegates with special powers to act for each Dominion.<sup>1</sup> The Imperial Conference of 1926 left open the question of the mode of procedure, suggesting that a single delegation representing the whole of the Commonwealth<sup>2</sup> might be preferred, but the present system is clearly established and is not likely to be departed from. It applies even to cases where the Empire must act as a whole, as in the Treaties of London, 1930 and 1936. There is nothing in such cases to show the fact that unity of action is imperative. The whole matter depends on considerations of necessity from the point of view of foreign powers, which clearly cannot in some matters accept the dissociation of the Dominions from the United Kingdom. In such a case ratification as well as signature for the whole of the Empire is essential, a fact

<sup>1</sup> The legal character of such treaties as distinct from the old type of British Empire treaties is noted in the decision on *Radio Communication in Canada*, [1932] A.C. 304

<sup>2</sup> As at Washington in 1921-2 never repeated save at the London Reparation Conference of 1924, when the panel system of the Peace Conference of 1919 was temporarily revived; *J.P.E.*, 1924, pp. 498 ff., 678 ff., 730 ff.

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which may delay ratification as in 1930 until the last of the Dominions has found time to act and to obtain Parliamentary approval for ratification. It is not necessary even that ratification should be expressed in one instrument; in the case of the Paris Pact of 1928 separate instruments were preferred, and the Irish Free State and the Union of South Africa use their own seals on such documents. Similarly the settlement reached in 1932 as to the treatment of war debt reparations due by Germany was signed by the Dominion delegates, and their ratification was to be accorded in the same manner as the British, if the necessary conditions for bringing the Lausanne treaty into operation could be fulfilled.

In all matters of negotiation it is an obligation imposed by the Imperial Conference on the United Kingdom and the Dominions alike to engage in consultation in advance of action, so that no part of the Empire may negotiate without letting the other parts know, so that they may propose combined action, or at least may be able to make representations and to endeavour to safeguard their interests. Thus, when in 1928 the Union gave Germany a promise not to accord any preferences to the United Kingdom or the Dominions without extending them to Germany, the British Government was informed in advance of the intention and was able to point out the difficulties that might arise, but the Union, as it was clearly entitled to do, persisted in the course set. There is, of course, nothing to enforce the obligation save the agreement at the Conferences, first reached in 1923, reasserted and strengthened in 1926, and homologated in 1930; but these concurrences are essentially of the type which place a moral obligation of the highest quality on each of the Governments of the Commonwealth.<sup>1</sup> That the

<sup>1</sup> In 1937 New Zealand's Minister of Customs secured at Berlin a treaty with Germany with full British approval; *Parl. Deb.* ccxlviii. 662.

British Government has ever failed in this respect since 1926 has not so far been suggested by any Dominion.

In addition to formal treaties negotiated under full powers, it has long been recognised that the Dominions can, if they please, conclude more informal agreements direct with foreign Governments. In theory, as laid down by the Imperial Conference of 1923, these should deal with questions of technical or at least minor importance; but the most famous of all was the reciprocity agreement of 1911 between the United States and Canada, which embodied a principle so important as to bring about a Parliamentary impasse through the obstruction of the Opposition, and to lead to the downfall of the administration at the general election ensuing. Sir W. Laurier had been led on to this measure by the success of his earlier informal negotiations with Germany and Italy. Need for informal action was abrogated by the doctrine effectively asserted in 1923 that a treaty affecting Canada could be signed for Canada by a Canadian delegate without a British colleague, and there are obvious advantages in securing that measures are embodied in treaties which involve definite and well-understood obligations in lieu of mere governmental accords which suffice for a *modus vivendi*.

Indirectly, obligations can still be placed on Dominion nationals by British action without Dominion concurrence. The right to exercise extra-territorial jurisdiction belongs to the King on the advice of the British Government, and thus his renunciation on that advice alone of such jurisdiction as regards Albania in 1926 and his similar action in 1923 and 1928 as regards the Tangier Zone of Morocco, deprived British subjects resident in the Dominions or nationals thereof, of the rights formerly enjoyed in this regard, and placed them under control of the Albanian courts and the

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Mixed Court set up in Tangier; so also as regards French Morocco in 1937. This position is on a par with the fact that, by declaring war with Afghanistan at any time, the British Government could, without Dominion action, place British subjects in the position of alien enemies as regards that territory.

Benefits are still regularly provided for in British treaties, despite the Irish Free State doctrine that this is unconstitutional without Dominion signature of the treaty concerned. Thus in the treaty with Hayti of April 7, 1932, the right is taken in Article 10 to accede to the treaty for any Dominion or India and to withdraw separately if accession has been notified. Article 11 stipulates further for most-favoured-nation treatment in Hayti for goods, the produce or manufacture of any Dominion, so long as that Dominion accords such treatment to Haytian goods. Apparently also it is still the intention that under the treaty British subjects,<sup>1</sup> despite the fact that they are nationals of or resident in a Dominion which has not accepted the treaty, shall be entitled to the privileges provided in it as regards commerce and navigation, the carrying on of business or profession or occupation, residence, and the acquisition and disposal of property. It must be doubted<sup>2</sup> whether this claim will remain possible to maintain with the development of Dominion nationalities, and it has been negated in the Russian Agreement of 1934.

The forms taken by agreements, which are not put in treaty shape in the name of the King, vary. Thus the Union

<sup>1</sup> Canada in the Halibut Treaty of 1923 and Germany in its Patents Agreement of 1930 with the Union dealt with nationals and residents; so now regularly. Britain included all British interests and ships in the agreement with Cuba, February 19, 1937 (Cmd. 5383), and agreed with Japan, March 25, 1937, for the termination of all British perpetual leases (Cmd. 5548).

<sup>2</sup> Keith, *Journ. Comp. Leg.* xii. 293, 294. See p. 132, *ante*.

of South Africa in its convention with the Portuguese República as to native labour from Mozambique, railway matters, and commercial intercourse framed the accord as between the Union Government and the Portuguese Government, but the representatives communicated powers in good and due form.<sup>1</sup> This is very much in the same style as the agreement of August 30, 1935, between the British and Union Governments,<sup>2</sup> but with the omission of reference to powers in good and due form. On May 24, 1935, Mr. Coates, the Prime Minister of New Zealand, exchanged notes with the Swedish Minister in London arranging most-favoured-nation treatment pending the conclusion of a treaty.<sup>3</sup> On the other hand, an arrangement regarding Belgian trade with Australia was concluded at Canberra on November 19, 1934, between the Minister for Trade and Customs and the Consul-General of Belgium.<sup>4</sup>

In the treaties of the Dominions and the United Kingdom alike there is involved in the view of the British Government that domestic arrangements between parts of the Empire are not matters which fall within the scope of the most-favoured-nation clause in commercial treaties. The doctrine that such arrangements must not be regarded by foreign States as matters of which they can take cognisance was fought out by Canada and Germany on the occasion of the first preferential tariff (1898) of the Dominion. Germany retaliated on Canada for not treating Germany on the same footing as the United Kingdom, by placing Canadian products under disability, and Canada forced the retraction of this policy by her action in imposing from 1903 surtaxes on German imports, which convinced Germany that a tariff

<sup>1</sup> Parl. Pap. Cmd. 5085 (Nov 17, 1934, Lourenco Marques, ratified, July 12 1935, Pretoria)

<sup>2</sup> Parl. Pap. Cmd. 5012 (Pretoria, in English and Afrikaans)

<sup>3</sup> Parl. Pap. Cmd. 4955.

<sup>4</sup> Parl. Pap. Cmd. 4812.

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war was unprofitable. It cannot, however, be denied that the strength of this doctrine has been impaired by the action of the Union of South Africa in 1928 in promising Germany the benefit of any future British preferences, though the treaty was made terminable at short notice, and the Union explained that she would denounce it if it were shown at any time that the British Government were willing to offer better terms. But the Opposition suggested that the German negotiators had been too astute for the Union ministry, and it was also deemed possible that the Union desired to conciliate Germany in order to secure her acceptance of the loss of South-West Africa for good.

It is also now possible to argue that, as members of the League and signatories of the Kellogg Pact, the Dominions, being, as the British Government asserted<sup>1</sup> when signing the Optional Clause, "international units individually in the fullest sense of the term", are so clearly distinct States that the denial of the application to their concessions to one another in economic matters of the most-favoured-nation clause in treaties is impossible of acceptance. It is clear that this matter is vital, and that the Ottawa Conference, in determining that it is impossible to make any concession on that head, is acting in accordance with the necessities of the case. It was there agreed that no treaty obligations into which they might enter in the future should be allowed to interfere with any mutual preferences which the Governments of the Commonwealth might decide to accord, and that they would free themselves from existing treaties, if any, which might so interfere. They would also take all steps necessary to implement the preferences which may be granted. This arrangement involved not merely the disappearance of the principle of the treaty of 1928 between

<sup>1</sup> Keith, *Speeches and Documents on the British Dominions, 1918-1931*, p. 418.

the Union and Germany, which the Union secured by agreement of October 13, 1932,<sup>1</sup> but also entailed reconsideration of the terms of other existing British treaties, and the further obligation of securing commodity prices (e.g. of lumber) against the rendering useless of the preference by foreign dumping, as in the case of Russia, necessitated reconsideration both of the Russian agreement of 1930, which was duly revised,<sup>2</sup> and the German treaty of 1924.

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For purposes of business the Dominions have long been in the habit of using Trade Commissioners; thus the Union established one at Milan in 1921 and another in the United States in 1925, precursors in a sense of the later decision to have diplomatic representation in these countries, and has widely extended their use. She maintains also Commercial Counsellors at Berlin and Rome. The Commonwealth and New Zealand prefer to rely on such representatives in lieu of appointing diplomatists.

In the Dominions, foreign countries are regularly represented for economic purposes by consuls of various ranks, from Consuls-General downwards. As has been noted, the approval of such appointments rests now with the Dominion Governments,<sup>3</sup> and in the case of the Commonwealth also with the Governments of the States to which they are assigned. Consuls are not entitled to diplomatic immunities, but may receive minor courtesies from local authorities. If desired to act in a diplomatic function for any special occasion, they are given by their Governments the necessary full powers to exchange with the Dominion representatives, or they are simply authorised to conclude inter-govern-

<sup>1</sup> Parl Pap Cmd 4961.

<sup>2</sup> Cf. *J.P.E.*, 1934, pp 262 f.

<sup>3</sup> Exequaturs are sealed with the Union and Irish Free State signets, used also for diplomatic and consular commissions for their own consuls.

Chapter XVI. mental accords as often in trade agreements, especially if of a provisional character.

The Dominion Governments regularly issue passports to British subjects, whether natural-born or naturalised, resident in the Dominions. The protection of British representatives abroad is regularly extended to the bearers of such passports, even if the naturalisation is local only in legal effect as regards the Empire. For foreign purposes this limitation is disregarded, and British protection is extended. There is, of course, an inevitable exception in the case of those persons who, though naturalised in a Dominion by the local law, remain subjects of the foreign power in whose territory they are travelling. In such cases the British Government cannot demand, in the absence of special treaty, that the national connection accorded by naturalisation shall be accepted by the foreign power as prevailing over the original nationality. But difficulties on this score diminished for a time after 1919, partly through the disappearance of compulsory service in Germany, which formerly used to refuse to recognise local naturalisation of German subjects who had failed to undergo their military service.<sup>1</sup>

(4) In the League of Nations the Dominions occupy a place of absolute independence of the British Government, though as representing the Empire that Government has a

<sup>1</sup> The revival of nationalism has caused difficulties in the Dominions, where the action of foreign consuls in ordering their nationals—even if British subjects by naturalisation therein—to return home for military service, or labour service (as in the case of Germans in Canada on June 1937) is resented, but without sufficient grounds in international law. Such naturalised persons in their original countries cannot be aided but of course cannot be subjected to any coercion in the Dominions. Where the notices affect British subjects by birth, they can properly be objected to, as in South-West Africa in 1936, *J.P.E.*, 1936, pp. 625, 626, see Art. I of Protocol relating to military obligations in certain cases of double nationality, 1930.

permanent seat on the Council as well as representation in the Assembly. The delegates of the Dominions to the League Assembly<sup>1</sup> are accredited by the Governor-General in Council, and they are under Dominion control absolutely, and the position of the delegate of the new Irish State to the Council is the same.

Conventions signed under League auspices were for a time considered as proper for ratification by the Dominion Governments, but the resolution of the Imperial Conference of 1926 urged that, as a rule, treaties of this sort should be made in the form of conventions between heads of States, and this form exacts the formality of full powers issued by the King and ratifications signed by the King, as in the case of treaties negotiated apart from the procedure of the League. But this rule does not apply to conventions arrived at under the procedure of the Labour Organisation of the League provided for by the treaties of peace. Draft Conventions there accepted by any Dominion must be submitted to the authority competent to approve. This means, of course, the obligation to ask Parliament to consent to ratification, but in the case of the federations it is clear that the duty is fulfilled if the matter is brought before the provincial legislatures or the State Parliaments if the matter falls within their legislative sphere.<sup>2</sup> Nor in any case is there any binding obligation to press for approval.<sup>3</sup> The Government does not bind itself to make the matter one of party loyalty, and an indifferent Government may rest assured that no pressure will be put upon it by its Parliament. In the Union it has been observed by supporters of the Labour organisation that the ratifications effected by the Union are

<sup>1</sup> Canada has stationed an advisory officer at Geneva, and similar action has been taken by the Irish Free State and the Union of South Africa

<sup>2</sup> See pp. 438-40, 443, 444, *ante*

<sup>3</sup> See Keith, *Letters on Imperial Relations, 1916-1935*, pp. 313 f.

**Chapter XVI.** far too few, but the Union Government maintained that it had done all that was wise, and refused even to submit the Coal Hours Convention on the score that it had been approved irregularly by the Labour organisation.

In the Labour organisation the Dominions from the first were accorded full rights as independent members, an achievement of Sir R. Borden, who insisted that there must be no derogation from the status of the Dominions by reason of their connection with the United Kingdom. Canada now ranks as one of the eight leading industrial nations in the organisation, but unfortunately her activity is hardly on a par with the place assigned to her, as she has been able to do very little to ratify conventions. The reason, of course is that the issues discussed by the organisation are matters essentially appertaining to the provinces, with whose rights the Dominion, it is now clear, is legally unable to interfere.

(5) The actual contribution of the Dominions to the formulation of foreign policy in the League has been probably in the main, negative in character. They have been, in the words of M. Rappard, rather observers than actors in the discussions. But their activity must not be underestimated. Canada until 1923 led an energetic campaign to have it made clear that the obligations of the Dominion under Article 10, which she would have desired to suppress, must ultimately be determined by her Government, and that it could not be bound by the request of the Council as to action to vindicate the territorial integrity or sovereign independence of any member of the League. The interpretative declaration reached in 1923 was approved by 29 members, but 22 abstained, in the desire not to press their views unduly, and Persia rendered it purely a gesture by definitely declining to agree. Canada naturally would have none

of the Draft Treaty of Mutual Assistance, which rendered, in her opinion, the position even worse than did Article 10, for it definitely conferred on the Council, and not on the members of the League, the duty of determining the aggressor. Australia was equally hostile, insisting *inter alia* that she had not yet brought her own armaments to the stage of securing her protection from attack. The Geneva Protocol of 1924 was the object of a chorus of disapproval, Australia being specially anxious lest Japan should, under it, be placed in a more advantageous position to press the issue of exclusion. On the question of submitting to the compulsory jurisdiction of the Permanent Court there was less objection. Canada, while rejecting the Protocol, intimated that on principle she favoured acceptance of the Optional Clause of the Statute of the Court, and in 1925 the Irish Free State expressed dissent from the negative attitude of the United Kingdom. At the Imperial Conference of 1926, however, it was only possible to agree that no part of the Empire should sign without prior consultation, and it was under the Labour Government of 1929 that the Clause was signed by the United Kingdom and the Dominions, with reservations on the part of all but the Irish Free State, which signed unconditionally.<sup>1</sup> The exception from acceptance of inter-Imperial disputes on the ground of the special relationship of the parts of the Empire was only adopted by the Union on grounds of expediency, not of right, and Canada while making it, doubted if such a reservation was legitimate, and the Irish Free State negatived energetically the right to make any limitation and asserted that the Court was the suitable tribunal for such disputes. The acceptance of the General Act of 1928, for the Pacific Settlement of International Disputes, was pressed on the Dominions by the British

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<sup>1</sup> Keith, *Journ. Comp. Leg.* xi. 95, 96.

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The attitude of the Dominions to security is coloured essentially by the fact that Canada still, in part, relies on the Monroe Doctrine, and the Union on self-help for local purposes and the British fleet for security of trade, while Australia and New Zealand regard themselves as in essential alliance with the United Kingdom. As regards the acceptance of further obligations to aid other members of the

<sup>1</sup> Keith, *Journ. Comp. Leg.* xii 254.

<sup>2</sup> *Ibid.* xi 251, 252 The Pact clearly does not apply between the parts of the Empire, though it may safely be assumed with Mr. McGilligan that its principles would be applied.

League, Canada has strong objections;<sup>1</sup> it has always been held that the obligations of Article 16 are onerous enough, and hence it is surprising that the Dominion should have accepted the principle of agreeing to the amendments of the Covenant even conditionally. Canada, too, is far from being an admirer of any compulsion to arbitration. As in her domestic policy, she has believed in investigation and report, so that public opinion should operate to clarify the dispute, so in her negotiations with the United States and in the treaty of 1909 under which the International Joint Commission is constituted, the aim is rather to secure a report in which both Governments can concur than any arbitral pronouncement. South Africa, again, desires in any disarmament compact to prevent the training of African natives for war. But, though this would admirably meet Union needs, where an armed native population would be a menace, France may be excused if she feels that the power to use natives from her African territories may be essential to counter the plurality of German manhood.

In other issues the Dominions have taken a decided stand. On Albania, South Africa and Canada succeeded, in 1920, in securing the assent of the League to admission against French and British doubts. The Union consistently pressed for German membership of the League. All again were active in securing the reduction of their contributions to its expense, originally on the analogy of the Postal Convention fixed on the basis of equality of status with the United Kingdom. The issue of minorities was one of the grounds

<sup>1</sup> A curious rumour had to be formally contradicted during the Imperial Conference of 1937 by Mr. Mackenzie King that, at the instigation of some members of the British Cabinet, he was trying to secure the support of the Conference for the elimination of Art. 10 from the League Covenant.

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In economic issues the Dominions have been narrowly national, as was inevitable from their history. At the Assembly of 1920, as against the British Government, Mr. Rowell bitterly protested against the idea that the League could concern itself with the question of the distribution of raw materials, though obviously in a comprehensive survey of national relations such questions are of grave moment. The idea of any dealing by the League with immigration has always excited fears in Australia, which Mr. Latham voiced in 1926 when the question of the Economic Conference was mooted. The Conference wisely left migration alone, but its attitude towards customs tariffs drew, in 1928, from Mr. M'Lachlan the strong opinion that the issue was outside the sphere in which the League could wisely venture, a view which for the Irish Free State Mr. Blythe naturally countered. But he condemned the idea that tariffs all round should be reduced as unfair to the Free State with her too low tariff, which she must certainly increase, since industrialisation of the State to a certain degree was essential for a more just balance of productive activity. Australia and the Free State, in 1929 and 1930, were again vocal in denouncing the idea of a tariff truce or the lowering of barriers, and in 1930 repudiated the suggestion that the Central and South-eastern European States should be given a preference in the markets of Western Europe as a means of extricating themselves from the extreme economic depression in which they were

placed. The failure of the Dominions to realise, as late as 1930, the ruinous tendency of the erection of tariff barriers is natural enough, but it is significant of their almost complete detachment from the realities of the situation in Europe, and Australia was soon to realise that her own position was incapable of remedy by the mere process of rendering it impracticable for foreign countries to send her exports, while expecting them to take her natural products in ever-increasing amounts. But the numerous trade agreements since made by the Dominions with foreign powers have done little or nothing to modify the fundamental outlook of the Dominions on trade issues, or to convert them to the British standpoint that international trade must not be regarded as hostile to inter-Imperial exchanges.<sup>1</sup>

Great interest attaches to the attitude of the Dominions to the struggle between Ethiopia and Italy in 1935–6.<sup>2</sup> The Dominion Governments all supported the attitude adopted by Britain and the League. The suggestion of extending sanctions to the supply of oil was made by the Canadian representative at Geneva, but the Canadian Government disapproved his initiative,<sup>3</sup> and the sanction in question, which from the evidence of Marshal Emilio de Bono's book *Anno Xlll* would have probably saved the situation, was not applied, with the inevitable result of complete disaster for Ethiopia when gas attacks were made on a population without means of resistance, while bribery kept some

<sup>1</sup> Cf. Chap. XXI (4), *post*.

<sup>2</sup> Cf Keith, *Letters on Current Imperial and International Problems, 1935–1936*, Part II.

<sup>3</sup> *J.P.E.*, 1936, pp. 264–6, 269, 271, 491, 495 f. For the Australian Sanctions Act, 1935, No. 48, see *ibid.* pp. 59 f., 63, 544 f., for the New Zealand League of Nations Sanctions (Enforcement in New Zealand) Act, 1935, No. 17, see *ibid.* pp. 97 ff., 570, 573 ff., for the Union of South Africa, *ibid.* pp. 334–7, 339–42, 609, 612 f., 615, 622, for the Irish Free State, League of Nations (Obligations of Membership) Act, 1935, No. 40, see *ibid.* pp. 131 ff.

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200,000 Abyssinians from the field. The British Government, advised that the substitution of Italy for Ethiopia as a neighbour of the Sudan would not injure British interests and hampered by the disloyalty of France<sup>1</sup> to the League and to Ethiopia, fatally compromised the chance of securing United States co-operation in an oil sanction by the Hoare-Laval proposals in December 1935, which were made without Dominion approval. The case for Ethiopia was finally surrendered on the initiative of Mr. N Chamberlain in July 1936. The Union of South Africa protested strongly against the abandonment of sanctions in view of the grave blow which Italy had struck against the League and the respect due to treaties, and New Zealand likewise opposed; but the other Dominions, the Irish Free State with much regret, acquiesced.<sup>2</sup>

As might be expected, the Dominions have, like the United Kingdom itself, contributed nothing novel to the discussion of the possible improvement of the League Covenant in view of the Ethiopian *débâcle*. There has merely been general and inevitable agreement that the Covenant should be so amended as regards Article 11 as to allow of effective action with a view to prevent the emergence of a situation such as that of 1935 when, as Marshal de Bono's revelations prove, Italy was deliberately in cold blood discussing the means of destroying Ethiopia and of im-

<sup>1</sup> Cf Lord Rosebery to Queen Victoria, July 26, 1893 (Crewe, *Lord Rosebery*, ii 426). "The behaviour of France to Siam has it appears been base, cruel and treacherous. Perhaps nothing so cynically vile is on record. We cannot afford to be the Knight errant of the World, careering about to redress grievances and help the weak. If the French cut the throats of half Siam in cold blood, we should not be justified in going to war with her." But there was no League then, Britain was isolated.

<sup>2</sup> Cf. pp. 30, 31, *ante*. On the danger to Britain of Italian control of Ethiopia, see Lord Milner cited by Mr. Lloyd George, House of Commons, March 26, 1937.

mobilising the action of the League, and nothing could be done to counter her preparations since action of any kind for preventive purposes would demand unanimity on the part of the members of the League. The other point<sup>1</sup> is that of remedying the defects of Article 19, which demands the revision of treaties in the light of changing circumstances. There can be no possible doubt that the complete failure to make this provision operative has been a serious defect in the operation of the League. But, on the other hand, there must be set the fact that the most obvious revision of treaties in the interests of international peace is that involved in the return to Germany of some part at least of her lost territories overseas. For the British Government or the Dominions to stress the necessity of treaty revision, while maintaining rigidly the principle that such revision must not deprive Britain or the Dominions of the *spolia bellum*, places them in an invidious moral position, and gravely lessens the value of their opinion. The bland assumption that British control must be best in the interest of the natives and of the world is one which must impress foreign opinion with a certain bitterness of resentment for so imperturbable a national self-sufficiency. It is at least singular that even so balanced a study of Imperial problems as that contained in *The British Empire*,<sup>2</sup> the work of a Study Group of the Royal Institute of International Affairs, should completely fail to appreciate the non-British point of view. Yet without imagination and capacity to understand the attitude of other peoples the conduct of Imperial foreign relations can scarcely hope to be successful.

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<sup>1</sup> Mr. Eden, House of Commons, Nov 5, 1936.

<sup>2</sup> pp 249 ff Some sense of the position is revealed in Sir E Grigg's view, *The Times*, June 12, 1937 See Keith, *The King, the Constitution, the Empire, and Foreign Affairs, 1936-1937*, pp. 137 ff., 146 ff., 180 f.

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XVI. Australia went further in her attitude towards revision.<sup>1</sup> She pressed for the adoption of absolutely automatic sanctions if any power were declared an aggressor by the Council, prohibition of all exports to the aggressor, or at least of exports of munitions and raw materials used for military operations or manufacture of munitions; prohibition of all loans and credit facilities; and prohibition of all imports from the aggressor. It was hoped also to achieve a regional understanding and pact of non-aggression in the Pacific with the United States and Japan,<sup>2</sup> and approval was given to the generally popular idea of severance of the pact and the Treaty of Versailles. But as a preliminary to any amendments it was suggested that the United States, Japan, and Germany should be invited to express their views in order to secure their participation in the proposed discussions.

Having regard to the narrow outlook in all international issues thus shown by the Dominions, a certain measure of absurdity may be said to have attached to the views of those who urged the United Kingdom at the Imperial Conference of 1937 to give a bold lead to the Dominions to seek to secure stabilisation in Europe.<sup>3</sup> Patently, as had been made clear by the Dominion Parliaments throughout the Italian and Spanish issues—save in the case of New Zealand, the Dominions were more than ever determined to withdraw, as far as possible, from interest in the affairs of Europe. Their position is perfectly intelligible; it would require far more education in the essential facts of the

<sup>1</sup> Senator Pearce, Senate, September 30, 1936.

<sup>2</sup> Repeated at the Imperial Conference, 1937, May 14; Parl. Pap. Cmd. 5482, pp. 53, 67.

<sup>3</sup> See e.g. the suggestions of Sir A. Willert in *The Empire in the World* (1937), which have every merit except that of appreciation of the outlook of the Dominions.

interdependence of the countries of the world than has ever been attempted to induce the peoples of the Dominions to accept the necessity of concern for the position of affairs in Europe. But the existence of this attitude negatived any possibility of Britain securing from the Conference any policy of a decided type. Nothing whatever is gained by failing to face realities, and ministers at least can have no delusions on these issues. The Conference<sup>1</sup> acted precisely as was to be expected. It reiterated the obvious fact that it had not attempted to formulate commitments which in any event could not be made effective until approved and confirmed by the respective Parliaments, and it merely laid down, without prejudice to the rights of Governments to advocate the policies submitted to the League in September 1936, certain obvious principles: (1) The first objective is the preservation of peace. The adjustment of differences between nations and of national needs should be sought by methods of co-operation, joint enquiry, and conciliation and not by force. (2) The armaments of the several members will never be used for aggression or for any purpose inconsistent with the League Covenant or the Pact of Paris. (3) In order to strengthen the League by increasing its membership, they advocate the separation of the Covenant from the treaties of peace. (4) They welcome regional pacts of friendship and collaboration—referring plainly to the Franco-British understanding of 1936-7<sup>2</sup>—and approve in principle of a Pacific regional pact as urged by Mr. Lyons.<sup>3</sup> (5) As wide a measure of disarmament as can be obtained is desired, but the defence preparations of all the members

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<sup>1</sup> Parl. Pap. Cmd. 5482, pp. 14-16.

<sup>2</sup> Note that, as in the case of the Locarno Pact, the Dominions do not join this understanding.

<sup>3</sup> Japan by May 19, 1937, had shown profound doubt as to its practicability, and its visionary character was shown by the war with China.

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Finally the members of the Conference, while themselves firmly attached to the principles of democracy and to Parliamentary forms of government, registered their view that differences of political creed should be no obstacle to friendly relations between Governments and countries, and that nothing would be more damaging to the hopes of international appeasement than the division, real or apparent, of the world into opposing groups.

Admirable sentiments, however, do little to aid the aims set out, and the request to the Fascist powers to be friendly is little likely to conciliate States which are morally convinced of the worthless character of democracy, exhibited in the manifest reluctance of the members of the Commonwealth to adopt a common policy of defence and the resolute isolation of Canada, the Union, and the Irish Free State. What is for these States vital is the meaning of the first of these principles. Is it to be understood that the Commonwealth is prepared to make some sacrifice in territory<sup>1</sup> to gratify national needs? If not, then it may fairly be concluded by these powers that the Commonwealth, on this most vital head, is lacking in sincerity. The

<sup>1</sup> If appeasement does not mean any surrender by the Commonwealth, it cannot be expected to be accepted by Germany.

fact that the Governments at the Conference would assuredly have repudiated any such interpretation of their attitude is a striking proof of the extent to which self-interest darkens the vision.

(6) The Dominions, it has been suggested above, cannot claim the right to make war independently of the United Kingdom. The best case that can be made out for any such claim rests on their separate signature of the Kellogg Pact renouncing war as an instrument of international policy. But the value of the argument is minimised by the fact that it was an occasion on which the British Government successfully insisted that the conclusion of the Pact must depend on its acceptance by the whole of the Dominions. The argument that the Dominions have not accepted the British interpretation or reservation regarding the extent of the right of defence is interesting. It suggests that the Dominions might be internationally bound not to take as justified a war commenced on that plea by the United Kingdom, so that they would have the duty to be neutral in the conflict. This, however, does not show that the Dominions have any power to make war by themselves; at most it gives some ground for the argument of the possibility of neutrality. Against that argument must be set the fact mentioned above that the Dominions claim that their commercial relations *inter se* are not subject to the rights of foreign countries under the most-favoured-nation clause, and that they have asserted at the Imperial Conference of 1926 that it is recognised by the League that agreements *inter se* are not governed by the League Covenant and that the Covenant does not apply to their mutual relations. The dissent of the Irish Free State has been expressed in 1924, and in respect of the acceptance of the Optional Clause in 1929 and of the General Act of 1928 in 1931, but the Free

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State has no conclusive right to speak for the other Dominions. In fact she has expressly excluded from her treaties giving most-favoured-nation treatment any inter-Imperial concessions.<sup>1</sup> This, of course, may be treated as an admission that, but for the omission by specific mention, the concessions to other Dominions would fall within the clause; but it is also open to argue that the exclusion is a matter of precaution, and in any case it is certainly a definite expression of the view that inter-Imperial commercial relations should stand in a quite different category from international commercial relations.

As already pointed out, if a Dominion cannot be neutral in international law, the declaration of war by the United Kingdom without Dominion assent would clearly be most unfortunate. The necessity of carrying the Dominions with her in any policy is an obvious duty of the United Kingdom, and aggressive war is so little probable that the issue can hardly arise. If it did under circumstances implying the defective working of the Covenant and the Pact, it is clear that it would rest with each of the Dominions, if not attacked, to regulate its conduct according to its own interest and any agreement for Imperial co-operation it might have made. The automatic effects of belligerency, such as severance of relations with the enemy country, internment of enemy vessels and of enemy subjects, would depend on Dominion decisions. No doubt by legislation intercourse with the enemy could be facilitated as much as the Dominion deemed desirable, even at the expense of friction with the United Kingdom and other Dominions. In such a manner a Dominion might produce in effect the condition of peace between itself and an enemy State, but it must be doubted whether it could make a valid peace

<sup>1</sup> So the Union in her agreement with the Netherlands, Feb. 20, 1935.

without severance of the Imperial bond. It is in fact in the last resort clear that the King could not, at one and the same time, be head of a country waging war and of one which made peace with, and thus rendered material assistance to, the enemy of the United Kingdom.

(7) The position of Newfoundland, from the first up to 1934, differed essentially as regards foreign affairs from that of the ordinary Dominion, which is a member of the League of Nations, and therefore in a very definite sense an individual unit of international law. In the case of the great international Conferences it was not the practice for Newfoundland to be given special representation, the British representatives act for it as they do for Southern Rhodesia, Malta, and the Crown Colonies and Protectorates. On the other hand, it must be remembered that, while for other parts of the Empire the United Kingdom makes the final decision in these issues of acceptance or not of treaty obligations, it only adhered for Newfoundland with the assent of that Dominion. Nor in theory would that Dominion have been refused the right to conclude a treaty through her own representative, who would sign the convention if the matter raised were one of special concern to the Dominion, as for instance would be a compact as to trade with the United States. It must, however, be remembered that the obligation to consult the Dominions on treaty matters involved the right of any of them to object to separate action by Newfoundland, and diminished the possibility of Canadian interest being prejudiced by separate action by that Dominion.

The Dominion was entitled to the régime of discussion of British policy at the Imperial Conferences and to consultation on all issues of general concern, as in the case of the Geneva Protocol of 1924, and the disarmament projects of

Chapter XVI. the British Government. But in issues of fundamental importance it was contented to adopt British guidance—and indeed New Zealand has often accepted a like doctrine without public dissatisfaction. It is not doubtful that a British declaration of war would have at once applied to Newfoundland, and for the purposes of the jurisdiction of the Permanent Court of International Justice, as for representation in the League of Nations Council and Assembly, Newfoundland was dependent on the action of the British Government. It was not a unit which could be deemed responsible internationally to a foreign power for any action taken by it contrary to treaty, for that the United Kingdom still remained bound to answer, and if necessary to accept the findings of the Court or the intervention of the League of Nations. Its position thus in these matters resembled that of Southern Rhodesia, but in virtue of membership of the Imperial Conference and the right to enjoy the benefit of its resolutions as to consultation on international issues it differed in essence from that colony.<sup>1</sup>

Since the suspension of the constitution in 1934, the position, of course, has considerably altered. There is no authority now in Newfoundland independent of the control of the British Government, and thus the status of the Dominion in external relations cannot be made effective. But the constitution is not permanently abrogated; its resumption, though after some delay, is contemplated as intended, and already there is a local movement in favour of the regaining of control by the people. Hence it is fair to assume that, in due course, Newfoundland will be awarded

<sup>1</sup> Southern Rhodesia was duly represented at the Ottawa Conference and entered into trade agreements. At the Imperial Conference of 1937 it and Burma were represented by observers, who saw most of the game, Parl. Pap. Cmd 5482, pp. 60, 71. Cf. Keith, *The King, the Constitution, the Empire, and Foreign Affairs, 1936-1937*, pp. 114-18.

the status above described. At the same time it may well be  
that Southern Rhodesia will be given equivalent status; and  
Burma is in like case, though there, of course, the extent of  
the control of the Imperial Government over affairs is far  
greater than in Southern Rhodesia. But political develop-  
ment in Burma may easily be rapid.

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## CHAPTER XVII

### THE DEFENCE OF THE DOMINIONS

Chapter XVII. SINCE 1862 at least it has been recognised that the true policy of the Empire is that each Dominion should be prepared to undertake all matters of local defence, while external defence should largely be a matter for the British fleet. But it has also been recognised that even as regards naval defence the Dominions should endeavour to relieve the British taxpayer of some portion of the cost. This feeling has resulted in the development, on the one hand, of the military and air defences of the Dominions in practically complete autonomy, and, on the other hand, of the gradual evolution of naval defence based on the closest co-operation with the British fleet.

(1) Constitutionally, of course, the Crown is the head of the various forces throughout the Empire, but the practice of law is to grant to the Governor-General the title of Commander-in-Chief. In the Irish Free State alone was the position of the King ignored, as it was as far as possible in every form of governmental and judicial activity. That did not, however, up to December 1936, alter the fact that the troops owed allegiance to the sovereign and that the whole of the executive Government was vested in the Crown, though in effect the power was exercised quite independently of the King or his representative in the Free State by the Executive Council or the Minister for Defence.

Whatever the extent of the prerogative of the Crown in

matters of defence in the Dominions,<sup>1</sup> the matter of government of armed forces now rests on Statute which may be taken to have rendered obsolete any prerogative powers. The keeping of a standing army of any kind in the Dominions is no doubt illegal unless approved by Statute, and the present forces are all so regulated. Such power of compulsion to serve as now exists in law depends entirely on Statute, and the courts are open to test the validity of any effort to compel service. During the war of 1914–18 the extent of the power to provide for defence was tested in the Dominions by persons who alleged on one ground or another that the Dominions had no power to compel men to serve overseas, but in Canada,<sup>2</sup> in Australia,<sup>3</sup> and in New Zealand<sup>4</sup> alike the arguments adduced were rejected.

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(2) The defence policy of *Canada* is essentially conditioned by the conviction that war with the United States, after a century and a quarter of unbroken peace, is unthinkable. It is also based on the conviction that the attitude of Canada, on her obligations under Article 10 of the League Covenant, has been such that the League Council, in the event of it recommending military or air sanctions under Article 16 of the Covenant, would not contemplate suggesting that Canada should despatch any forces to Europe. Further, it rests on the absolute principle that any commitment to use Canadian forces must have the deliberate approval of Parliament, which has never yet been asked for in respect of any guarantee of commitment. On February

<sup>1</sup> In the Commonwealth it can be exercised only by the Governor-General: *Joseph v. Colonial Treasurer* (1918), 25 C.L.R. 32; cf. *Metropolitan Coal Co. v. Australian Coal, etc Employees* (1917), 24 C.L.R. 85.

<sup>2</sup> Keith, *War Government of the British Dominions*, p. 84 (*Grey's Case* (1918), 57 S.C.R. 150).

<sup>3</sup> *Sickerdick v. Ashton* (1916), 25 C.L.R. 506.

<sup>4</sup> *Semple v. O'Donovan*, [1917] N.Z.L.R. 273.

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12, 1936,<sup>1</sup> the position of Canada was emphasised by both Mr. Mackenzie King and Mr. Bennett when they stressed the fact that the Government was in no way a party to the British rearmament programme of March 1935, and that anything to be done in the way of defence rested on Canada alone, which would place any proposal before Parliament. In the same spirit in the debate on Mr. Woodsworth's motion of January 25, 1937,<sup>2</sup> in regard to Canadian neutrality, Mr. Mackenzie King stressed the fact that no request had come from Britain regarding the character of Canadian defence preparations, and that the defence estimates were essentially and solely based on the necessities of Canadian defence only, having regard to her position in the world. He rejected the Imperialistic theory of solidarity with Britain, and the isolationist theory of Canada disregarding all external matters, and expressed adherence to the traditional Canadian theory of deciding as to participation in British wars according to the exact conditions in each case, a view which was easily carried with wide accord on the part of the Conservatives.

The National Defence Act, 1922, transferred to a department of National Defence control of the militia, the navy, and civil and military aeronautics. The minister is aided by a deputy, and by an Order in Council of 1923 there was constituted a Defence Council over which he presides, his deputy being Vice-President, while the members are the Chiefs of the General and the Naval Staffs and the Adjutant-General; the Quartermaster-General and the Director of the Royal Canadian Air Force are associate members.

In law all male British subjects in Canada between ages

<sup>1</sup> *J.P.E.*, 1936, pp. 274 ff., cf. 1935, p. 691

<sup>2</sup> *J.P.E.*, 1937, pp. 305 ff.

eighteen and sixty are liable to serve in the militia, and in the case of a levée *en masse* all the male inhabitants capable of bearing arms are liable to serve. Further power exists to complete a corps either for training or emergency by ballot; but these powers are not used, and, although the militia is legally liable not merely for defence in Canada but also without Canada for the defence of the Dominion, men for oversea service were compulsorily raised in 1917–18 under special legislation. Nor is there any doubt that the same procedure would be followed if occasion arose, even if it were not held requisite to obtain popular authority by a general election held specially for the issue, as promised by Mr. Meighen in 1925 but not homologated either by his own party or by the Liberals. In time of war and when under exercise the troops are made subject by the Militia Act to the Imperial Army and Air Force Acts.

Under the arrangements in force during the war the final control over the Canadian forces was vested in the British Commander-in-Chief, though especially in 1918, with the expansion of the Dominion forces, an increasing autonomy in all but the highest strategy was accorded and the proposal to despatch to Italy forces less than a division was successfully negatived. In view of the constitutional changes since the war, it is contemplated that in any future war in which Canada takes part, Canadian personnel will be reserved for Canadian units, and not allowed to serve in other units, the Canadian forces will be administratively self-controlled with direct responsibility to the Canadian Government; and that, tactically, the Canadian commander will probably be placed under the control of the Commander-in-Chief, but will not thereby be freed from responsibility to the Canadian Government for the safety of his command. The position will palpably be a difficult

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one, but clearly it alone is in accord with the essential conditions of relations.

The military forces are raised voluntarily, and divided into the Active Militia and the Reserve Militia. The former is made up of a small permanent Militia (465 officers, 3760 men in 1937) charged with the care of forts and the provision of schools of instruction and instructors for the non-permanent Militia; engagement is usually for three-year periods. The non-permanent Militia is trained for brief periods, which have varied greatly from time to time according as reduction of cost or efficiency was the end chiefly had in mind. In 1937-8 some 46,340 were contemplated as training for from ten to fourteen days. The Reserve Militia if raised would be enlisted voluntarily. The organisation is elaborate, and cadets for commissions are trained in the Royal Military College at Kingston; they are eligible for entry into the Imperial forces.

The Air Force is likewise organised on the basis of a permanent and a non-permanent force, the numbers being, in 1937, 195 officers and 1498 men in the former category, 108 and 946 respectively in the second. During the summer the Air Force is chiefly engaged in civil operations. Aeroplane photography in connection with the preparation of maps, fishery protection, the study of the spread of pine blister, wheat rust, and so forth are carried on, while in winter military training is given. The force is deservedly popular.

The total estimates for the military and air services rose greatly in 1937-8. The militia estimates at 17,850,428 dollars exceeded those of the previous year by 4,550,000 dollars. The air estimates at 11,752,650 dollars showed the even greater increase of 5,550,000, an eloquent testimony to the effect of the Ethiopian and Spanish wars on both technical and civilian opinion.

Importance attaches to cadet training, but it evokes annually denunciations of singular absurdity from pacifists. To industrial development in defence interests more favour is shown, as will be noted below, and greater realism in matters of defence is beginning to appear.

(3) The *Commonwealth of Australia* has passed through various stages of development of military policy. The first period was devoted to the reorganisation of the colonial forces on a national basis. Legislation in 1903 and 1904 recognised the obligation of all male inhabitants between eighteen and sixty years of age to serve in Australia in time of war. From 1909 onwards compulsory training was accepted, especially after Lord Kitchener's visit, the age at which it ceased being twenty-six. But the war supervened, and bitter contest was waged over the question of compulsory recruitment for the Australian Imperial Force; but neither in 1916 nor 1917 was conscription carried at the referenda. After the war a divisional organisation was worked out with a minimum permanent staff on the basis of the units of the Imperial Force. In 1922, however, financial and other considerations brought about the reduction of the scheme to a nucleus force, and in 1929 the régime of much modified compulsion ceased, the Labour party, which once had been the driving force in its favour, having become definitely hostile to its continuance. A voluntary basis was adopted, and accordingly the nucleus force of 48,000 of the Citizen Force and 16,000 Senior Cadets was reduced to 35,000 Militia and 7000 Senior Cadets, nor were these numbers at all closely reached. Under the voluntary system enlistment is from those between eighteen and forty years of age, for three years, with the possibility of re-engagement up to age forty-eight. The training for the Militia Force is six days in camp and six days at home.

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Senior Cadets at ages sixteen and seventeen are trained with the regular detachments. The permanent force serves for the administration and instruction of the military forces, and in 1936 numbered 235 officers, 49 quartermasters, and 430 warrant and non-commissioned officers. The Military College, fixed at Duntroon in 1937, provides instruction not merely for Australian cadets but also for a contingent from New Zealand (45 and 11 respectively in 1936).

The programme<sup>1</sup> for defence in 1936-7 stressed the necessity for strengthening the forces and completing their organisation. The organisation provided for the nucleus of a field army of two cavalry and five infantry divisions, and the coast defences of the important ports. The permanent forces provided the staff of formations and units, and the cadre of the coast defence units and a technical corps. The Militia Forces provided leaders, specialists, and other rank and file required for the peace establishment of units. The field army was organised as a nucleus, but its framework was designed for expansion in time of war to allow the man power of the country to complete existing units and secure the formation of new units. The total of the permanent forces was to be raised to 2300, and the Militia would be brought nearer the 35,000 figure by doubling the inadequate pay of 4s. a day and by the encouragement given by large employers. Mechanisation would be pressed forward, and in conjunction with the State Governments measures would be devised to counter possible gas attacks. The total cost thus reached £2,948,732.

In the same spirit important increases in the Air Force programme were announced, at a total cost of £1,443,652.

<sup>1</sup> House of Representatives, Sept 11, 1936: Mr. Lyons, Imperial Conference, 1937, Cmd. 5482, pp 54, 55. For 1937-8 £11,500,000 (£2,500,000 from loan) is provided, military, £3,264,000; air, £2,672,000, civil aviation, £940,000; munitions supply, £1,039,000; navy, £3,616,000.

The basis of the development is a scheme laid down by Sir John Salmond in 1928, but plans have been widened with a view to obtaining a force of 194 first-line strength in aircraft, 96 of which were to be achieved in the year, despite the difficulties of supply from Britain owing to the demands of the Royal Air Force. The personnel of the permanent forces would be raised to 2263, and four Citizen Air Force squadrons were to be established.<sup>1</sup>

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The present policy of Australia in defence accepts to the full the duty of local defence as laid down at the Conference of 1923. But it also accepts a general interest in the maintenance of the strength of the British navy and Dominion navies at parity with any other power, and in the establishment of naval bases, especially with regard to the vital necessity of securing the Suez-Red Sea line of communication. It is admitted also that the preservation of Empire trade routes is a matter of common concern, and that equality of status demands the undertaking of responsibility in a fair measure in the burden of Imperial defence, a doctrine accepted by New Zealand but repudiated by Canada, the Union of South Africa, and the Irish State. It therefore aims at securing uniformity of organisation and of training of its forces with those maintained in the United Kingdom and in India.

The administration of the services rests with the Department of Defence under a minister and a secretary. There is a Council of Defence under the presidency of the Prime Minister, on which the three services are represented and

<sup>1</sup> Labour supports (1) concentration on local air defence, by creating a force of 600 planes; (2) no increase of the navy; (3) no external commitments or engagements to the Empire; (4) no use of forces outside Australia except on a referendum, *J.P.E.*, 1937, pp. 852 ff. The General Election of Oct. 23, 1937, was a verdict against this policy (forty-five seats to twenty-nine in the House of Representatives).

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which deals with policy co-ordinating the requirements of sea, land, and air. There is also a Defence Committee, whose chairman is the Chief of the General Staff, and the other members of which are the Chiefs of the Naval and the Air Staffs, the Finance Secretary of the Department of Defence, and the Secretary. Each service has its own Board under the presidency of the Minister of Defence, and is responsible for the control and administration of the forces.

A war railway council consisting of military and railway officers was instituted in 1911 to furnish advice regarding railway transport for military purposes, and to secure co-operation between the Defence and the Railway departments in regard to the concentration and the mobilisation of troops.

The discipline of the forces is based on local legislation, which in the main accords with the Army and Air Force Acts of the Imperial Parliament. Under these Acts the legislation of Australia has effect extra-territorially, and it was respected during the war, although certain differences between penalties caused some awkwardness.

Great importance attaches to the munitions policy of the Government involving an expenditure of £581,463 in 1936–7. The policy includes the provision of factories<sup>1</sup> on a nucleus basis for the production in war of articles not required in peace, and the development of industry with due regard to the exigencies of war supply, as in the United Kingdom, whose aid in developing these schemes was invited at the Conference of 1937.

(4) *New Zealand* policy recognises not merely the duty of home defence but that of contributing to the maintenance of the trade routes and the upholding of the naval strength of the Empire. Political considerations in effect produce

<sup>1</sup> £3,500,000 had been spent on munition factories up to May 1937.

similarity of policy with Australia. The system of administration is simple. The Minister of Defence is connected on the one hand with the Naval Board, over which he presides, and on the other with General Headquarters New Zealand Military Forces. The military forces were commanded by a general officer, assisted by branches of General Headquarters, the New Zealand counterpart of the War Office. In August 1937 the decision was taken to create a Council of Defence and to place the Military and Air Forces under Boards.

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Like Australia, New Zealand under Lord Kitchener's influence adopted compulsory training for defence, and unlike Australia used compulsion to keep up to strength the force she sent overseas in the Great War. On the return to peace compulsion was not at once laid aside, but it was in practice modified by many concessions, some of them dictated by considerations of economy. The abandonment of compulsion by Australia in 1929 led to the proposal, rejected by the Legislative Council, to abandon compulsion, but in 1931 the Government intimated that it was determined to rely on a voluntary system. For that purpose the maximum age for service in the Territorial Force was raised from twenty-five to thirty-five, and in the case of the Reserve from thirty to forty; officers might remain to age sixty, warrant officers to age fifty. The territorial organisation was adhered to on a voluntary basis, a total of 10,000<sup>1</sup> as a maximum being aimed at, while expenditure was to fall by a half down to £200,000 with £40,000 for the Air Force, which is treated as an integral part of the military forces. The result was that in 1933-4 the expenditure per

<sup>1</sup> The number in 1936 was 12,146, but the actual strength was under 8500, and the value of the Territorial Force was stated by the Minister for Defence to be doubtful, *J P E*, 1937, p. 141. The system of coastal defence was planned with Sir Maurice Hankey's aid in 1934, £1,000,000 to be spent over six years.

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head of New Zealand on defence fell to 3s. 8d. per head, comparing unfavourably with the 4s. 2d. even of Canada and the 7s. 2d. of Australia. In 1934 the amount for land and air defence was raised to £524,600, and it was announced that two flights of torpedo-carrying aircraft, and one flight of coastal reconnaissance aircraft had been ordered, to be manned by regular personnel in addition to the Territorial Air Force. The policy also included the provision of anti-aircraft guns and the substitution of guns with 20,000 yards range for coastal defence. The policy of gradual increase of expenditure without any change of policy from the voluntary system has been maintained under the Labour régime.<sup>1</sup>

The legal position of the New Zealand forces is the same as in Australia; the local Acts are based on the Imperial Army and Air Force Acts in so far as active service is concerned, and have extra-territorial effect under the terms of the Imperial Acts.

It is intended to make as much use of Australian manufacturing resources as possible for the supply of munitions, and to use Australian institutions for purposes of training officers.

(5) The *Union of South Africa* was partly formed in order to consolidate defence, and the task was in progress when the war broke out and exposed it to the strain of a rebellion and an attack on South-West Africa. Its success was such that on December 1, 1921, the Imperial Military Command in South Africa was abolished, and responsibility for the coast fortress defence of the Cape was taken over by a Union Commander. The necessary property for the purpose

<sup>1</sup> £80,000 extra for military and air expenditure was allowed in the financial statement, August 4, 1936, the total for all forms of defence being £1,100,000, including £300,000 on aerodromes. The 1937 programme aims at more effective field-training; three-months' courses for coastal defence, and the provision of training schools.

was handed over gratis by the Imperial Government, and legislative provision was made by the Union for its maintenance for that purpose (Act No. 33 of 1922). Chapter XVII.

The Union still retains the doctrine of compulsory training and service laid down by the Defence Act of 1912, and now amended in certain respects by the Act No. 22 of 1922.<sup>1</sup> Under it every citizen of European descent is liable to render service in any part of South Africa within or without the Union in time of war for the defence of the Union. Every citizen of sound physique is liable to four years' training between age seventeen and twenty-five. A minimum of 50 per cent of those liable is called upon to serve; those who are not selected must at age twenty-one enter a rifle association for four years. As an alternative every such person may enter the South African Division of the Royal Naval Volunteer Reserve, and any citizen may enter a rifle association if he pleases. There is a small permanent force and a Coast Garrison Force composed of Garrison Artillery in which citizens may serve, and a Coast Defence Force of men trained in engineering, harbour work, etc. The Active Citizen Force is composed of those in training between age seventeen and twenty-five; the Rifle Associations include all those not so trained from age twenty-one to twenty-five, and others who volunteer, as well as boys from thirteen to seventeen in areas where no cadet training exists. The Citizen Force Reserve is made up of ex-members of the Active Force up to age forty-five and ex-members of Rifle Associations up to the same age. The National Reserve embraces all between seventeen and sixty not serving in the Active Force or the Citizen Force

<sup>1</sup> See also Defence Act (Amendment) and Dominion Forces Act, 1932 (No. 32), passed in view of the Statute of Westminster, 1931, and the changed position under it of the Imperial Army and Air Force Acts.

**Chapter XVII.** Reserve; after these have been called out in time of war, the National Reserve may be called up in three classes by age. Cadet training was originally provided from age thirteen to seventeen for those boys whose parents did not object; it lasted for three years and shortened the period of compulsory service. In November 1933 it was decided to reduce the number of cadets proper, by limiting training to boys of fourteen years and over and retaining only efficient detachments with a minimum of forty boys, while at schools where such detachments existed boys of twelve and thirteen might receive training as junior cadets. Great importance came to be attached to the Air Force, an aircraft and artillery dépôt being established at Roberts Heights, with a central flying school, and the Cape squadron with a service flight at Cape Town, while there were set up a special reserve of flying officers, a general reserve of officers, and a reserve of artisans, who are trained at Roberts Heights.

The permanent force includes the staff corps, artillery, air force, instructional corps, engineer corps, infantry, ordnance corps, service corps, medical corps, veterinary corps, administrative, pay, and clerical corps. The infantry is provided by the Special Service Battalion which was created by General Hertzog's Government for the purpose of assisting unemployed youths of fair education between seventeen and twenty-two years of age. Enlistment is for one year, with release after six months to enter Government employment, or after nine months in case of other employment. The battalion's headquarters are at Roberts Heights, with companies at Cape Town and Durban. A Pioneer Battalion was established on January 1, 1935, at Bloemfontein for unemployed over age seventeen, who serve for six months and then obtain places as labourers in Government and other services.

The essential basis of Union policy is the defence of the Union wholly divorced from any undertaking to play a part in Imperial Defence. "We are not bound directly or indirectly", Mr. Pirow has declared,<sup>1</sup> "to take part in a war in Africa or elsewhere. We shall take part in no war except where the true interests of South Africa make such a participation inevitable." In the same spirit on May 8, 1937, on the eve of the Imperial Conference which he deliberately did not attend, Mr. Pirow insisted that Britain had never suggested that the Union should do more than deal with its own defence; that he did not expect that any suggestion to do more would be made; and that the Union was determined not to do any more. In the same manner, while the Union invites the advice of the Imperial Defence Committee, it does not maintain, any more than does Canada,<sup>2</sup> permanent membership of that Committee. But certain relations of an intimate type none the less exist between the British and the Union Governments, for the transfer of the British Government's defence lands in 1921-2 was conditional upon the undertaking by the Union of the protection of the naval base at Simonstown, and that agreement was decisively reaffirmed by Mr. Pirow in April 1937 as absolutely binding on the Union. As has been noted above, the agreement is decisive against the possibility of Union neutrality as of right in a British war, and this fact enlarges the obligations of the Union. Moreover, there are important considerations based on the view of Mr. Pirow, that not only is the Union bound to be able to repress

<sup>1</sup> May 6, 1936, *J.P.E.*, 1937, p. 611. At Klerksdorp on Oct. 18, 1937, he said: "If ever you are called upon for active service because we have a contract with England to go to war, I tell you now, as Minister of Defence, I give you permission to rebel".

<sup>2</sup> *J.P.E.*, 1937, p. 316.

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native unrest in her own areas,<sup>1</sup> but that it is important that she should be able to do so in respect of Basutoland, the Bechuanaland Protectorate, and Swaziland. Further, he contemplates the concern of the Union with the defence of Europeans against native unrest in the whole of British South Africa south of the Sudan, throughout which one native policy ought in his opinion to prevail. No admission naturally has ever been made by the British Government that it should surrender its policy—however half-hearted and feeble in execution—of trusteeship for natives in favour of the South African plan, recently carried a further step in the Native Laws Amendment Act, 1937, of controlling the natives in the interests of the Europeans. While it may be admitted that the Union policy of suppression may generate the dangers feared there, it is still possible that just treatment of the natives may render it unnecessary to adopt the attitude in other British territories that native risings are imminent. In West Africa the British Government has not found it necessary to base its policy on any such assumption.

Union views have further been affected by the destruction of Ethiopia and the danger of ultimate attack on the Union by a European power using trained native troops. This fear is in part due to the very modest measure of success achieved by General Smuts in his East African campaign, whence he derived the impression, since communicated to Mr. Pirow, of the danger of training such troops, a policy negatived by the Union, which forbids any military training, an attitude inconsistent with recognising the elementary right of any people to be trained for self-defence, accorded in the Mandates of the League of Nations.

<sup>1</sup> Repression in this way in May 1922 of the Bondelzwarts received condemnation from members of the Mandates Commission.

Recent plans for the defence of the Union are based on these considerations, envisaging the more effective defence of Cape Town by making Robben Island the pivot of defence, mounting in due course 15-in. guns, and by mounting heavy guns at Durban, where two aeroplane squadrons are posted. In four years it may be possible, by encouraging youths to take fuller advantage of the present training facilities, to have a mobile striking force of 50,000 men, an anti-tank force, 50 heavy bomber planes, and from 250 to 300 interceptor-fighters and bomber-fighters, mobile artillery, gas contamination units, an explosives corps recruited from miners, and a large body of natives trained for transport purposes and to act as servants to the field force. Under the existing system some 13,500 men are trained annually; the Special Service Battalion puts out 2000, and the Pioneer Battalion 800 men per annum, while 500 cadets are turned out. There are, of course, large potential reserves in those who have served in rifle associations, and the chief difficulty is obviously finance, since even in 1934-5 the total expenditure was only £1,035,948, and it had not reached £1,400,000 in 1936-7.<sup>1</sup> But much aid has been given in 1937 by the British Government in the sale at a nominal price of aeroplanes, namely 100 Hawker Hartbeestes at £200 each. An ammunition factory at Pretoria at a cost of £150,000 was arranged for in March 1937 between Imperial Chemical Industries and the Government. At the same time, there was set up a War Supplies Board to deal with that issue, which has similarly been taken up by Canada and the Commonwealth.

Responsibility for defence rests with the Department of Defence, presided over by the Minister. He is advised by a

<sup>1</sup> At the Imperial Conference of 1937 stress was laid on the fact that expenditure was thrice as great as in 1932-3. It is £1,666,090 for 1937-8.

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Council of Defence of officers of experience and a member of Parliament. The Secretary of the department is also the officer in command of the Union defence forces. The other chief officers are the Chief of the General Staff, an office up to 1933 combined with that of Secretary to the department, the Quartermaster-General, and the Director of Medical Services. There are an Adjutant-General and a Director of Technical Services. The control of civil aviation, in view of its importance in case of war, was in September 1931 transferred from the Department of Posts and Telegraphs to that of Defence. The position is governed by the Aviation Act, 1923 (No. 16), passed in order to give effect to the International Air Convention.

(6) Defence in the *Irish Free State* has never attained stabilisation. The Department of Defence can be traced back to the revolutionary Ministry of Defence, organised in 1919 to combat British rule. After the treaty of 1921 the Provisional Government reorganised the republican forces and formed out of them a regular army, which took over control of the areas evacuated by the British army in 1922, and this force, whose legality was recognised by the courts, finally overcame the resistance of Mr. De Valera and his associates. The strength of the army is limited by the treaty of 1921 to a total which bears the same proportion to the British forces as does the population of Ireland to that of Great Britain. The provision is ambiguous, because Ireland may denote the whole geographical area; but the issue is unimportant, for no Irish Government has ever contemplated the maintenance of any large force such as could resist foreign aggression. The local force, therefore, has been employed essentially for local peace and order; legislation would be necessary if it were desired to use it for defence

purposes overseas. The force provided<sup>1</sup> for in 1936-7 was 5931 all ranks and services of the regular army, 5893 reserves, and 18,500 in the volunteer force, but of these only 5000 first-line and 1500 second-line volunteers were to be raised that year. It is to this force, which seems to have been created by Mr. De Valera as a counterblast to the illegal Irish Republican Army, whose activities formed one of the dangers of his tenure of office, that the State is to look in future for protection against aggression. The Minister for Defence admitted the completely defective state of equipment, mechanisation, transport, and reserves of every kind of war material, and explained the increase of estimates up to £1,530,000 by the necessity to remedy some of the defects, though he admitted that the State could not attempt to keep pace with the extraordinary development of modern aircraft. A second brigade of artillery has been supplied with guns, and machine guns have been secured for the whole of the infantry battalions.

The control of the forces has from the first been divorced from the name of the Crown, which was ignored in the military oath. Instead the command-in-chief was vested in the Executive Council, which exercises it through the Minister for Defence, who bears the title of Commander-in-Chief, but who may not exercise executive command, and may not be an officer on full pay. He is president of the Council of Defence, which includes a civil member who is Parliamentary Secretary, and three military members whose tenure of office is limited to three years to ensure absence of undue rigidity. There is a Military College, staffed by officers trained in the United States Army Staff College, and, with eclectic generosity, the headship of the

<sup>1</sup> Minister for Defence, March 24, 1936. There was no substantial change in 1937-8.

Chapter XVII. School of Music was bestowed upon a former officer of the Prussian Guards, who reciprocated the confidence reposed in him by rendering important services to the cause of Irish military music.

There has been remarkable delay in laying down a permanent code of military law, but ultimately the temporary measures, which are passed yearly, will be superseded by a Defence Forces Act. The constitutional position is maintained in the Constitution of Éire, which assigns all control to the Government but the grant of commissions to the President, who is in supreme command of the defence forces, his relations with which fall to be regulated by law.

*Newfoundland*, owing to lack of funds and to dependence on Britain for defence, has not developed the military organisation arranged in war time, and has ceased even to maintain its branch of the Royal Naval Volunteer Reserve.

(7) While the control over land forces was from the first clearly vested in the Dominion Parliaments, for the Imperial Army Act was carefully framed to leave room for local legislation for local forces, the development of naval forces in the Dominions was long retarded by the difficulties of legal authority. It was commonly held that the lack of extra-territorial power on the part of the colonies prevented their laying down discipline for ships outside territorial waters,<sup>1</sup> and obviously a navy restricted to operations in such waters would serve no useful purpose. An imperfect effort was made by legislation in 1865 to facilitate independent control of local flotillas, with full power to secure that in time of stress or war they would be available for Imperial control. Some use was made of this power especially in Australia, but it was not until the Colonial Conference of 1907 and the later Conference of 1909 on defence that

<sup>1</sup> *Brisbane Oyster Fishery Co. v. Emerson*, Knox (N.S.W.) 80.

the decision was arrived at to permit the development of naval forces under Dominion control, which would probably be transferred to British control in war. This project was developed at the Conference of 1911 to provide for the creation, if desired by Canada and the Commonwealth, of two squadrons with defined areas of operation. To render control possible an Imperial Act was necessary, the Naval Discipline (Dominion Naval Forces) Act, 1911, which ingeniously ensured that the Dominions should be able to legislate for their forces without danger of the measures being held *ultra vires*, while the British Government was enabled by Orders in Council to carry out the purpose of securing that there should be a regular relation of seniority between officers of the British and Dominion navies, and that officers of the different navies should be available for service on courts-martial affecting officers of other branches. The Statute of Westminster, 1931 (s. 2), by its insistence on the right to repeal Imperial Acts as far as they extend to the Dominions, and by the grant of extra-territorial power, completes the work of rendering beyond doubt the right of the Dominions if they please to control their forces.

The other aspect of control affects the position of Dominion war vessels in foreign waters and harbours. On that subject also agreement was achieved in 1911 on the basis of a duty of notification to the British Admiralty and the British representative at foreign courts of the intention to visit foreign waters and harbours. Now that Dominion representation has been established, these officers might be used as channels of communication in such an event. But in general<sup>1</sup> the rule remains that the commanders of war vessels in such circumstances shall accept the advice given

<sup>1</sup> Australia alone has a real navy and she has no diplomatic representatives, except from 1937 a few liaison officers, see p. 582, *ante*.

Chapter XVII. by the British Government on any issues of ceremonial or questions of foreign policy.

(8) The strength of the Dominion naval forces was steadily diminished for a long time after the war. An elaborate scheme for the creation of a fleet largely of Dominion character for the Pacific, evolved by Admiral Jellicoe, had no attractions, and the Washington Conference of 1921-2 confirmed the determination of Canada to abandon any serious development of naval defence, and induced *Australia* to limit her efforts, while the compulsory sinking of H.M.A.S. *Australia* had a depressing effect in 1924. In 1925, however, it was decided to build in replacement two cruisers of 10,000 tons as permitted under the Washington Treaty, and the *Australia* and *Canberra* were duly commissioned in 1928. Moreover, in order to give Australian officers and men the opportunity of sharing in fleet exercises on a large scale, the wise decision was made of exchanging a cruiser periodically with the British navy. The vessel thus exchanged, of course, falls under the control of the fleet to which it is attached, due legal provision being made for that purpose; but there has been a certain amount of difficulty owing to the feeling which has been raised in the Commonwealth when Australian vessels have been employed on work in Chinese waters<sup>1</sup> or in the Mediterranean.<sup>2</sup> It would manifestly be impossible to give the Commonwealth Government the right to veto such usage, but no doubt, as Mr. Bruce indicated in the former case, the Government whose ship was concerned would properly be fully informed of the proposed employment and thus enabled to make any representations which it deemed desirable.

<sup>1</sup> Cf. Keith, *Responsible Government in the Dominions* (1928), ii 1016, 1017.

<sup>2</sup> For a Labour demand for the withdrawal of H.M.A.S. *Australia* in Sept. 1935, see *J.P.E.*, 1936, pp. 60 ff.

A decision to provide two submarines, taken in 1925, was found to be unsatisfactory, and was modified in 1930–31, in view of the difficulty experienced in keeping in efficiency in Australia so highly specialised a service, and the British Government in 1931 took over the submarines as a free gift, agreeing to bear the cost of their maintenance. A seaplane carrier *Albatross* was built at Sydney and commissioned in 1929. With the gathering seriousness of European and Pacific problems the policy of expanding the fleet has been taken in hand. Expenditure in 1936–7 was fixed at £3,237,387, and the fleet in commission was then three cruisers, one of 7250 tons having been added, one flotilla leader, two destroyers, two sloops, and a survey ship. Further local construction at Cockatoo Island<sup>1</sup> Dockyard is planned. A floating dock has been successfully installed for the service of the cruisers. The personnel of the sea-going fleet was raised in 1937 to 4290; there is also a fleet reserve, a large naval reserve, and a naval volunteer reserve. Cadets are trained from age thirteen at the Naval College at Flinders Naval Depôt, Victoria, to the number of forty-five. Men are voluntarily enlisted, and the personnel is now almost entirely Australian. The form of training and matters of equipment are based on those of the British navy, and the necessity of the closest assimilation in every respect, including discipline, is fully admitted, although the fleet is completely under Australian control, even in war, unless the Australian Government should then decide to place the force under the supreme authority of the British Admiralty and the Naval Commander-in-Chief. The desirability of maintaining complete autonomy was asserted by the Dominion Prime Ministers even after the experience of the war. No doubt, if sufficient development of Dominion

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<sup>1</sup> Leased to a private company in 1933; Act No. 73 of 1933.

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New Zealand maintains her naval force as a distinct unit under her own control, but in closer relation to the British navy. Thus the New Zealand force ranks as the New Zealand Division of the Royal Navy, and it is still necessary to rely for officers on the British navy. The Dominion's limited resources confine expenditure within narrow limits. It maintains two cruisers of the *Leander* type lent by the Admiralty, provides a base and repairing facilities at Auckland, and also facilities for training men for naval service. Recruitment is voluntary for twelve years with the possibility of extension to twenty-two. The supreme control rests with the Minister for Defence, who is aided by a Naval Board, whose existence was recognised by legislation in 1936, and which includes the Commodore commanding, a Captain R.N., and the Secretary to the Board.

Like Australia, New Zealand has endeavoured to increase her share towards naval defence, but her exertions from 1927 to 1936 took the form of a payment of £100,000 a year towards the cost of the vital Singapore base. Since that was dropped, money has been spent in maintaining two larger cruisers in place of those at first lent by the Admiralty. This involved in 1936-7 an extra cost of £190,000 to be set off against the cessation of the Singapore subsidy. The British Government maintains within the limits of the New Zealand station two sloops for patrol work in the Pacific.

(9) The position of *Canada* differs very greatly from that of Australia or New Zealand, but the idea of a Canadian navy, entertained rather feebly by Sir Wilfrid Laurier before the war, has never flourished. The negligible unit

existing was transferred to British control in 1914, as were the Australian and New Zealand forces, and after the war construction was never seriously resumed for reasons above mentioned. The naval policy of Canada was bent on the protection of Canadian shipping at the focal points of congestion, and no contribution to the defence of the United Kingdom or Australia or New Zealand was accepted, despite the efforts of Prime Ministers of the Commonwealth, not least Mr. Lyons, to convince Canadian opinion of the justice of taking a fair share in providing security in the Pacific. The difficulties of the position can be judged from the hostile amendment moved on February 15, 1937, by a member of the Co-operative Commonwealth Federation protesting against the startling increases of expenditure on national armament, though that on the navy was no more than 1,550,000 dollars, bringing the total up to 4,486,610 dollars, a sum almost negligible when compared with the £105,000,000 of the British naval estimates for 1937-8, and the expenditure on defence as a whole of £1,500,000,000 for five years determined upon. The ludicrous suggestion was made that the Canadian Government had made increases as a contribution to Imperial defence in return for economic concessions, that Sir Samuel Hoare<sup>1</sup> had pressed Canada to contribute, and that Canada was preparing to intervene on Britain's side in a European war which would be the outcome of British Imperialism. Yet, absurd as the attitude was, it was necessary for the Prime Minister<sup>2</sup> to deny categorically and immediately the allegation and to declare that there were no commitments or understandings in the nature of commitments between the Canadian Government and the British or any other Government. The Minister of

<sup>1</sup> Speech at Bradford, Feb 5, 1937.

<sup>2</sup> J.P.E., 1937, pp. 319, 323-5.

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XVII. National Defence, who had shortly before rebuked Lord Elibank for his rather pointed suggestions that Canada really ought to do something to share in the burden of protecting Empire trade which was of such great profit to the Dominion, claimed that "the defence of our shores and the preservation of our neutrality are the cardinal principles of the defence policy of the Dominion of Canada", and he went on to admit that Canada had been neglecting the matters of essential armaments even to the point of endangering her national security. All that the navy was doing was to secure two new and efficient destroyers from the Admiralty, making their total up to four, and four mine-sweepers will be built in Canada, thus restoring the force to its former dimensions before the old mine-sweepers became too worn out to be of use. As against an expenditure<sup>1</sup> in the year preceding of 1.77 dollars per head, must be set that of Australia at 5.28 dollars, and of Switzerland at 19.50 dollars, and yet the neutrality of Switzerland was guaranteed. He defended the estimates as a whole as only for the defence of Canada; as not having been arranged between Canada and any other nation; there had not been in connection with a single item of the estimates any request from any Government; Parliament must be the final judge as to Canada's participation in any war, and, fifthly, in reply to arguments from the existence of the League of Nations, only a universal League would be an absolute guarantee of peace. Industrial organisation had been examined by the Department of National Defence as in Australia with the view to securing the supply of defence equipment in peace time, the export of munitions or supplies, and the supply of munitions in

<sup>1</sup> Mr. Collings in the Australian Senate (Aug. 26, 1937) gave the figures: New Zealand, 12s 7d., Canada, 5s. 7d.; South Africa, 3s 5d., Australia, 21s. 10d.

war times; and relentless measures were under preparation to secure the control of profits.

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The Prime Minister stressed the fact that the League, instead of being a source of security, might involve Canada through economic sanctions in risk of war. It was impossible to rely on the aid of Britain and the United States if Canada refused to do anything to help herself. Far from interpreting the Monroe Doctrine as obliging the United States to undertake the policing of the western hemisphere, its meaning had come to be that, where the United States undertook an obligation, she expected to do so in consultation with the other countries affected. Were they prepared to surrender to the United States the whole of their obligation in the matter of protection against foreign aggression? Were those who were going to the Imperial Conference of 1937 to be asked to assert Canada's equality of status, but to tell the British Government that they were looking to Great Britain for the protection of their coasts, while doing nothing for themselves because they had that protection? Unless they were in a position to safeguard their own commerce within their harbours and rivers, they could not expect to maintain neutrality, even if they were determined to do so. He derided the fear of the danger of attending the Imperial Conference. A Conference was not a body to make policy for the Empire or to carry it out; it was a meeting of representatives to confer on matters of great common concern, and his administration at the Conference of 1937 would take its traditional attitude for such Conferences, that it was not in a position to bind Canada to anything. But, if Canada were providing for her own defence, it must not be thought that she was not thereby making some contribution to the defence of the Empire.

It is interesting to note that Mr. Mackenzie King revealed

Chapter XVII. the fact that in the autumn of 1936 a sub-committee of the Cabinet, the Canadian Defence Committee, had been established to consider problems arising from the international situation. It is clear that, while the advocates of an absolute neutrality have not won wide support in Canada, there is the utmost reluctance to do anything save the barest minimum for self-defence. The expanded programme after all merely allows of additional aircraft to patrol the coasts and shipping terminals, of the provision of additional coastal batteries, including anti-aircraft guns, to engage hostile craft and to defend the entrance to ports and inland waters, and of a slight increase in naval strength to challenge suspicious craft and to keep the harbour-mouths free of mines, a need emphasised by the experience acquired during the civil war in Spain.

(10) Naval defence in the *Union* once promised to be taken up by General Smuts as a matter of national obligation in view of national status, but realisation of the cost hastily terminated the project, the existence of which had formed a sufficient excuse for terminating in 1921 the very modest subsidy paid towards the cost of the British navy as an inheritance from the pre-Union régime in the Cape of Good Hope and Natal. Since 1934 all idea of naval activity has been dropped, and the only service directly rendered to the navy consists of the existence of the South African Division of the Royal Naval Volunteer Reserve, which is open to citizens liable for peace training at their option. Companies and flotillas are established at Cape Town, Durban, Port Elizabeth, and East London. The Division is administered under the orders of the Commander-in-Chief Africa Station, whose headquarters are at Simonstown, where extensive dockyards, including a graving dock, have been formed for naval purposes. The dock and dockyards

are available by permission of the captain in charge for merchant vessels, if no other accommodation is then available, and subject to the priority of naval defence work.

On May 22, 1936, an effort was made by the Dominion Party to secure as a King George V Memorial an arrangement with the Admiralty for the admission of up to five hundred South Africans for service in the navy, the subsidy of £300,000 a year, or a proportionate subsidy, being paid in respect of this contribution to naval defence. It was pointed out that in 1934 the Union received £32,000,000 imports from the United Kingdom and sent there £45,000,000, while the British fleet secured also the safety of £34,000,000 imports from other countries whose navies were unrepresented in the southern seas and of £16,000,000 Union exports thither. Counting in the gold premium, the balance of trade in favour of the Union with Britain amounted to £34,000,000, and it was wholly unsatisfactory to argue that the protection of all this trade should be left without contribution for Britain to carry out. Naturally no response was made to this suggestion, for the Union is well content to economise at the expense of the British taxpayer, apart from the indifference of a population largely inland to the importance of sea power. Stress was laid on the fact that the British Government had not asked anything more to be done; but the argument is obviously without value, for the failure of that Government to ask is simply due to the constitutional principle acted on consistently by Britain that it may suggest the propriety of greater aid to the burden of Imperial defence, but that it does not ask for it. Mr. Alexander, in opposition in the discussion of the naval estimates of the United Kingdom for 1937-8 which involved a new programme of three battleships and seven cruisers, stressed the weakness of the defence in the Pacific and the

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failure of Canada to take any steps in that regard.

The obligation of the Union in respect of the land defence of Simonstown and the international position thence resulting have been fully discussed above.<sup>1</sup>

(11) The *Irish Free State* under the treaty of 1921 authorised the British Government to take charge of coastal defence, without prejudice to the right of the Free State to construct such vessels as were necessary for the protection of the revenue or the fisheries. In fact for the latter purpose one small vessel has been armed. The arrangement fell to be reviewed by a conference of representatives of the two Governments to be held five years later with a view to the Free State undertaking a share in her own coastal defence, but no such conference was convened. For the purpose of such defence in time of peace the British Government was given definite facilities. The dockyard port at Berehaven was to remain under the charge of British care and maintenance parties, as also the harbour defences at Queenstown, Belfast Lough, and Lough Swilly, with facilities in the neighbourhood of the above ports for coastal defence by air. In time of war, or of strained relations with any power, the British Government was to be accorded such harbour and other facilities as it might require for the purpose of coastal defence. As has been seen, this right would nullify any claim by the Free State to be treated as neutral in war, and Mr. De Valera<sup>2</sup> has suggested in lieu to give a guarantee that no enemy of Britain would be allowed to base an attack on Britain by use of Free State territory. That offer so far has not evoked acceptance by Britain in lieu of the present rights enjoyed.

(12) The Dominions possess unfettered control over their forces, and even in the event of a declaration of war by the

<sup>1</sup> See pp. 50, 51, *ante*.

<sup>2</sup> *The Times*, May 8, 1935.

British Government which might involve them willingly or otherwise in hostilities, it would rest with them to decide to what extent, unless attacked, they would use their forces to aid Britain, and in every case their Parliaments would have to decide, as was law under Article 49 of the constitution of the Irish Free State, which is repeated in that of Éire, Article 28 (3). A Government might, of course, prepare troops preliminary to the decision of Parliament, but it could neither compel service nor provide funds for equipment of an expeditionary force without sanction of Parliament, even were it reckless enough to contemplate such action. The further suggestion of Mr. Meighen in favour of a general election to decide on participation has been mentioned above; the use of the referendum would probably even be worse as a means of eliciting effective opinion.

It must be remembered that various factors have combined to lessen Dominion willingness to play a part in defence. The creation of the League was believed to have paved the way for reduction of armaments, and the Locarno pacts of 1925, and the Paris Treaty of 1928 for the renunciation of war, seemed to many to render peace assured. The efforts of the Disarmament Conference were taken more seriously than they deserved, and Mr. Baldwin's failure in 1934,<sup>1</sup> when he realised the danger from Signor Mussolini's aggressive spirit and Herr Hitler's ambitions, to warn Britain naturally induced the Dominions to share the optimism which paralysed British efforts. The Monroe Doctrine shed its aegis over Canada, and not until 1936 was the President's change of attitude understood. Even now the Dominions are inclined to regard dangers as mainly European, forgetful that Japan cannot but resent exclusion

<sup>1</sup> Fully admitted in his speech at Glasgow, Nov. 18, 1936, confirming his Commons speech, Nov. 12, 1936.

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from the Commonwealth<sup>1</sup> and tariff discrimination, only in part appeased by the latest accord, and that Germany has a strong claim to readmission to territorial possessions in Africa which can be denied only at the risk of grave repercussions in which the Union, Australia, and New Zealand are deeply concerned.

In the event of any Dominion desiring to use its forces overseas in an Empire war, the legislation of the Dominion can make the amplest provision for their control, and even in the war period of 1914–18, before the Statute of Westminster, 1931, the powers of the Dominion Parliaments added to the Army Act—now also the Air Force Act—availed to remove any possibility of lack of legal authority. The Dominion may either in such a case retain control of its own forces or co-operate more completely by placing them, as during the war, under the British Commander-in-Chief, while sharing through some form of War Cabinet for the Empire with the British Government the supreme control of their employment. In view of the possibility of co-operation efforts have been made to assure similarity of organisation and training and of types of armament, equipment, and stores, while the Dominions have based their training manuals and their codes of regulations for use in war time on the Army Act and Air Force Act, with such modifications as Dominion sentiment renders necessary. It may be remembered that Australian law during the war of 1914–18 was less rigorous in punishments than British, and that on the other hand the Imperial Parliament in 1930

<sup>1</sup> It is significant that on May 14, 1936, the New Zealand Government had to deny a rumour that it was conferring with Australia to oppose any effort by Japan to put pressure on the Commonwealth by transferring her purchases of wool to New Zealand (*J.P.E.*, 1936, p. 807). New Zealand, of course, is very anxious to secure Japanese acceptance of the whaling industry agreement of 1931 (*J.P.E.*, 1936, pp. 106, 107).

made, against the advice of the Army Council, several mitigations in the terms of the Army Act in order to reduce the number of offences for which the death penalty was exigible, thus in part assimilating British law to the Australian model. The same aim to secure effective co-operation when desired is seen in the interchange of officers in the endeavour to secure the fullest friendly co-operation between General Staffs in the United Kingdom and in the Dominions, and in the invitation to the Dominions to take advantage of the facilities for the study of strategy and kindred problems afforded by the establishment of the Imperial Defence College.<sup>1</sup>

The most important symbol of Imperial co-operation is the Imperial Defence Committee,<sup>2</sup> the creation of Mr. Balfour when Prime Minister, whose activities were as far as practicable developed by Mr. Haldane. The essence of that body is the principle as regards the Dominions of inviting their Governments to have issues affecting defence discussed there by Dominion ministers and experts, so that the Dominions may have the advantage of the best possible advice in any matters in which they care to receive it. The Committee has no powers of decision; it is purely an advisory body, though in the case of the United Kingdom its advice is normally adopted by the Cabinet and the Prime Minister, who presides over its most important sessions. In its power of securing expert investigation on any issue it possesses resources which no Dominion Government can ever expect to enjoy. It cannot, however, be said that the suggestion<sup>3</sup> that each Dominion should create a like Defence Committee

<sup>1</sup> The Union and the Irish Free State ignore the invitation. The interchange of officers of all three services, which is very useful, is equally unacceptable to these Dominions.

<sup>2</sup> See Anson, *The Crown* (ed. Keith), i 148 f., ii 245-7.

<sup>3</sup> Imperial Conference, 1911, and reaffirmed in 1912.

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has evoked much response. The nearest approach really to anything parallel was delayed until Canada in 1936, as noted above, appointed a Cabinet sub-committee to investigate defence in detail. In other cases Councils of Defence consisted merely of officers who dealt with details, not with the fundamental defence issues. But in 1937-8 Australia and New Zealand revised the Council system to plan defence.

It is significant also that neither Canada nor the Union is willing to be regarded as permanently represented on the Committee of Imperial Defence, as against Australia and New Zealand. The point of view of both the Canadian and the Union Governments is that they are willing to submit definite points to the Committee,<sup>1</sup> but cannot do anything which resembles setting up an Imperial Defence Council in the full sense of that term as a body entitled to plan defence on Imperial lines.

\* There has already been noted<sup>2</sup> the constitutional importance of the legislation of 1932-3 necessitated by the Statute of Westminster, 1931, s. 4, which regulates the position of the forces of any unit of the Commonwealth if stationed with consent in the territories of another unit. Only in the case of the Irish Free State was no provision enacted to affect the existing position of the forces of the Crown employed in exercising the functions of coastal defence set out above. The several Acts passed on the lines of the Visiting Forces (British Dominions) Act, 1933, contain the necessary provision under which officers of the several forces can be given relative rank and power of

<sup>1</sup> In 1936 Mr. Pirow rather ostentatiously insisted that his mission to London to discuss issues of transportation and defence was not connected with any general gathering, and he avoided the Imperial Conference discussions of 1937.

<sup>2</sup> See pp. 91-3, *ante*.

command: such a list was issued with the Army Orders of the United Kingdom in August 1935. Provision is also made so that individual officers or men, when lent to another Government or being trained with the forces of such a Government, shall be subject to the authority of the local Government concerned. Action to this end had already been taken in 1922 to make members of the navy lent for service in the Commonwealth amenable to Commonwealth naval discipline in lieu of that of the United Kingdom.

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The most fruitful method of co-operation in defence is that discussed fully at the Imperial Conference of 1937,<sup>1</sup> namely the concert of effort for the production of munitions and the question of food supplies. Patently, in the event of a serious war there is much to be said for the existence of widespread facilities for manufacture of munitions, not least so since the adoption by the United States of an attitude regarding supply of munitions to belligerents which might impair that vital source of supply. All the Dominions have, as we have seen, realised the importance of the issues of food and munitions, and the whole of the questions involved were investigated at the Conference, though the results in vital respects cannot be made public property. The provision of air bases and refuelling stations along essential routes was also noted with approval by the Conference. It laid stress on free interchange of views between technical officers, while insisting on the necessity of submitting for governmental decision any issue of policy. It also recorded approval of full interchange of information with regards to air, military, and naval forces; the continuance of the arrangements already initiated for concerting the scale of the defence of ports; and measures for co-operation in the defence of communications and other

<sup>1</sup> Parl. Pap. Cmd. 5482, pp. 16-20, 54, 55, 57.

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common interests. But so nervous was it of seeming to compromise autonomy that it added its recognition that "it is the sole responsibility of the several Parliaments of the British Commonwealth to decide the nature and scope of their own defence policy". This, of course, reflects the determination of Canada not to yield to the arguments of Australia and New Zealand that Imperial defence is a problem which ought to be dealt with on a co-operative basis. Even in the case of Australia, it must be added, the policy of isolation in defence was stressed by the Labour party in its bid for victory at the election of 1937, when Mr. Curtin enunciated, as a plank in the Labour platform, a doctrine of concentration on local defence without any Imperial engagements. This contrasted curiously with Mr. Lyons' insistence in London in describing the basis of Australasian defence "as participation in Empire naval defence for the protection of sea-borne trade, as a deterrent to invasion and as a general measure of defence against raids, combined with local defence to provide a further deterrent to and defence against invasion and raids". In the same spirit Mr. Savage urged for New Zealand her insistence on close co-operation in defence matters. The Government desired to make sure that expenditure on the three services was properly balanced and laid out so as to enable the New Zealand forces to act in the most efficient way possible, not only in the local defence of their country, but also in Commonwealth defence in co-operation with the forces of other countries of the Commonwealth. In this connection great importance was attached to the Singapore base, to which New Zealand alone of the Dominions had contributed. Canada remained obdurate, though stress was placed on the increased expenditure, the additions to the strength of the naval and air forces, the reorganisation of

the militia, and the modernisation and mechanisation of equipment as well as the industrial aspect of defence preparations. To go further<sup>1</sup> would clearly have been most unwise, especially in view of the defection of the Liberal leader in Ontario and the emergence of a vehemently nationalist Government in Quebec. The deliberate absence of Mr. Pirow was in keeping with the Canadian attitude, for his discussions in 1936 to which the Conference referred were based on the essential doctrine, reiterated on May 8, 1937, that the Union would confine her activities to purely local defence. Thus of the five Dominions three are wholly unwilling to co-operate in any scheme of Imperial defence, while Australia and New Zealand are not merely anxious, under their present Governments for co-operation, but are frankly desirous that Canada and the Union should play their full share.

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<sup>1</sup> Mr. Mackenzie's remark (Dec. 14, 1937) that "Great Britain has always shouldered very great responsibilities. She should, and must, be supported in her struggles in this regard" was used so effectively against the Government in a bye-election in Quebec that Mr. Lapointe had to intervene to show that Canada was rearming not to send Canadians to war but to protect them against it. This secured success.

## CHAPTER XVIII

### THE CHURCHES IN THE DOMINIONS

Chapter XVIII. FOR a variety of reasons the Imperial Government never succeeded in securing the adoption of the doctrine that the Church of England held in the colonies the same position as it did in England. In fact the appointment of a bishop to the American colonies, a step which must have raised in acute form the whole legal position, was deliberately avoided, to the great detriment of the adherents of that body, and in the case of Quebec, the King, who would not concede any freedom of religion to his subjects in Ireland, was induced to consent virtually if not to establish, at least to endow, the Roman Catholic Church in Quebec, and to release it in fact from the measure of civil control which the French kings had always, in consonance with the fixed principles of the French monarchy, continued to exercise over the appointment and activities of the episcopate.<sup>1</sup> The result of this policy has been that in the Dominions there is no established church save that of Quebec, which may in effect be held now to enjoy that position. In the Coronation Oath of 1937 the royal obligation to maintain the Protestant religion was, without legal authority, restricted to the United Kingdom (more properly England and Scotland), thus according with fact.<sup>2</sup>

<sup>1</sup> Keith, *Const Hist of the First British Empire*, pp. 222 ff., 386 ff.

<sup>2</sup> Keith, *The Scotsman*, March 25, April 6, 17, 1937; *The King, the Constitution, the Empire, and Foreign Affairs, 1936-1937*, pp. 21-31.

(1) It was at first held that there existed prerogative power in colonies to create bishoprics by letters patent, and to confer on these bishops power to deal with the conduct of clerical persons, and to inflict ecclesiastical punishments upon them. For this purpose it was deemed necessary to give authority to summon and swear witnesses, but otherwise jurisdiction over the laity was not asserted. Bishoprics of this type were created in Canada from 1787, in Newfoundland in 1839, and in Australia from 1836, but such action in 1842 in Tasmania elicited protests against the right to summon and swear witnesses. It was then realised that the prerogative power did not extend to authorise such action, and henceforth, save by inadvertence, letters patent gave merely the power to visit and enquire into clerical action. The lack of coercive power was speedily remedied, by local Acts or by consensual compacts as in South Australia, in the Australian colonies, and in Canada. But in 1853 letters patent were issued under which the Bishop of Cape Town, whose office had been created with power to visit only in 1847, was given the position of metropolitan in respect of the newly created bishops of Natal and Graham's Town. This led to the decision of the bishop to summon a synod, and to a conflict with Mr. Long in his diocese, who held that the bishop's action was illegal. The status of the church was therefore investigated in *Long v. Bishop of Cape Town*<sup>1</sup> by the Privy Council, which held that, after the grant of representative institutions to the Cape, the Crown could neither regulate religion nor civil rights by prerogative, and that Mr. Long's position must rest merely on contract, not on any jurisdiction inherent in a bishop. As, however, Mr. Long was in the right in objecting to a synod held

<sup>1</sup> 1 Moo. P.C. (N.C.) 411; Keith, *Responsible Government in the Dominions* (ed. 1912), iii. 1426-35.

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without the authority of the Crown or the legislature, he had done nothing to merit removal. This was followed by the famous conflict between the bishop and Dr. Colenso, Bishop of Natal, when the bishop as metropolitan sought to remove Dr. Colenso from his post because of his alleged heretical doctrines. In this case the Privy Council, on a misunderstanding of the facts,<sup>1</sup> held that the Crown had no legislative power as regards Natal, and that the metropolitan relation was invalid in respect of civil law, for the law of the Church of England was no part of colonial law without legislative sanction. In fact the Crown had still power, as Natal was a conquered or ceded colony and had not then received representative government, so that the principle of *Campbell v. Hall*<sup>2</sup> did not apply, and in *Bishop of Natal v. Green*<sup>3</sup> the local court asserted, quite correctly, the authority of the bishop over his clergy under the letters patent.

The Imperial Government, however, decided now to abandon creation of colonial bishoprics by letters patent, even where the legal power existed, and henceforth the colonial churches were allowed to regulate their own mode of selecting bishops, though, if a Dominion bishop desires consecration by the Archbishop of Canterbury, the royal licence must be obtained, while the position of colonial clergy was legislated for as regards England by an Act of the British Parliament in 1874 at the instance of Lord Blachford. South Africa developed a church of its own, in communion with the Church of England, but no part of it. This issue was settled by the Privy Council in *Merriman v.*

<sup>1</sup> *Lord Bishop of Natal, In re* (1864), 3 Moo. P.C. (N.S.) 115, cf. *Bishop of Cape Town v. Bishop of Natal*, L.R. 3 P.C. 1.

<sup>2</sup> (1774), 20 St Tr 239

<sup>3</sup> [1868] N.L.R. 138 Cf. *Bishop of Natal v. Gladstone* (1866), L.R. 3 Eq. 1, when the bishop's right to his salary from endowments was affirmed.

Williams<sup>1</sup> when it was pointed out that the constitution of the church of the Province of South Africa expressly disclaimed the binding effect of judgments on doctrine of the Privy Council, and thus created an irreconcilable gulf between the two churches. It follows, therefore, that any church in the Cape, which, like Trinity Church, is vested in trustees for the maintenance of worship according to the Church of England, cannot be handed over to the control of the South African Church unless of course by legislation, a doctrine reaffirmed in 1932 by the South African courts<sup>2</sup> following the decision of the Privy Council. In the same way the intervention of the legislature in 1910 was necessary to secure for the South African Church control of the property which had been in the charge of Bishop Colenso as a representative of the Church of England proper.

In 1936 arose the issue of the fate of Bishop's Court, the residence provided for the Bishop of Cape Town from funds collected in England at a time when there was no doubt felt as to the power of the Crown by letters patent to create a bishopric of the Church of England in the Cape. It might have been expected that the question would have been litigated much earlier in view of the ruling in *Merriman v. Williams*, but the successors of the original bishop had all received consecration from the Archbishop of Canterbury, and it was no doubt felt that they might be deemed fairly to fall within the terms of the trust. But the fact that Archbishop Phelps had not received such consecration raised a new issue, and in *Mills and Others v. Registrar of Deeds and Others*<sup>3</sup>

<sup>1</sup> (1882), 7 App. Cas. 484

<sup>2</sup> The dispute arose regarding the same Trinity Church as in *Merriman v. Williams*, the Appellate Division on June 30 negating any control over it of a bishop of the South African Church, cf. *Darroll and Another v. Tennant and Another*, [1931] C.P.D. 514, [1932] C.P.D. 405

<sup>3</sup> See Keith, *Journ. Comp. Leg.* xviii. 283, 284; [1936] C.P.D. 417.

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the future of the trust property fell to be decided. It had already been ruled in the case of Trinity Church that the Archbishop could not be regarded as the true successor of Bishop Gray, and in the English case *Colonial Bishoprics Fund, In re*<sup>1</sup> it was equally ruled that the archbishop could not claim an endowment of right, but that it might be awarded to him on the doctrine of *cy près*. In the same spirit the Cape Provincial Division recognised that the archbishop had no absolute right, but ruled that the *cy près* doctrine could be applied, since the Archbishop of Canterbury had given evidence making it quite clear that there was no possibility of the Crown appointing a bishop who would not be a bishop of the Church of the Province of South Africa, but a bishop of the Church of England *simpliciter*. Stress was laid on the fact that in reality the South African Church had never done anything to separate itself in doctrine from the Church of England. But the order of the court is not absolute. It is conditional on the Church of South Africa remaining in communion with the Church of England, refraining from altering its doctrines, or interpreting them through its courts otherwise than in accordance with the views of the ecclesiastical courts in England.

(2) The Protestant churches other than the Church of England never had any claim to be established churches, though the Church of Scotland had a right<sup>2</sup> to be treated under the Canada Constitution Act of 1791 as one of the Protestant churches for whose maintenance governmental endowments of land were provided, a régime which, after causing the long-drawn-out controversy over the clergy reserves, was ended in 1854 by the diversion of all the

<sup>1</sup> [1935] Ch. 148.

<sup>2</sup> W S Reid, *The Church of Scotland in Lower Canada* (1936); *Clergy Reserves Act, 1854*.

property to purely secular ends, with a saving for life interests. The position of these churches and of all other religious institutions rests therefore on contract, and on that basis the courts may have, when any civil as opposed to merely religious issue arises, to investigate the practice and doctrine of the church so far as to decide the justice or injustice of a claim to property or of immunity from removal from office. The position is thus precisely as in *Merriman v. Williams*, where it was necessary to decide whether or not the South African Church could assert a claim to property which was held on trust for the Church of England. The court perforce had to investigate the doctrines and discipline of the South African body to determine its relation to the Church of England, and the case is important because of the recognition that no mere change of form of government—which might be inevitable—would necessarily terminate vital connection so as to prevent continuity. The chief difficulty which now arises is to decide how far a minister may deprive himself of the right to appeal to the civil courts by binding himself to accept the jurisdiction of the religious courts. The question was debated in *Macqueen v. Frackleton*<sup>1</sup> by the High Court of the Commonwealth but without absolutely decisive results, and it is probable that no exact rule can be laid down *a priori*.<sup>2</sup>

<sup>1</sup> (1909), 8 C.L.R. 673. Compare *McMullan v. Free Church of Scotland* (1859), 22 D. 290.

<sup>2</sup> Disputes often turn on the power to adopt new doctrines where property is held on trust. *Wodell v. Potter*, [1929] 3 D.L.R. 525 (Baptist Church). The courts will not interfere in relations of members of a voluntary society if what is done is within the rules, if these are not contrary to natural justice and are applied in good faith. *Wetmon v. Bayne*, [1928] 1 D.L.R. 848. Nor in purely spiritual matters. *Stover v. Drysdale*, [1925] 4 D.L.R. 994. For a dispute as to a schism see *Brendzij v. Hajdij*, [1927] 1 D.L.R. 1051; as to a bishopric, *Scherbanuk v. Skorodoumow*, [1935] O.R. 342.

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Legislation to enable the churches to manage their affairs and to set out their constitutions in accordance with their wishes is far from rare. The Dutch Reformed Church was enabled to unite its distinct units in the four provinces by a Union Act of 1911. In 1927, by a private Act of the Union, the Wesleyan Methodist Church of South Africa, hitherto in organic union with the parent conference in Great Britain, was recognised as an entirely autonomous community, though remaining in communion with the parent body. Of fundamental importance to Canada has been the union of the Presbyterian, Congregational, and Methodist churches into the United Church of Canada. It necessitated Dominion and provincial legislation, for a church extending throughout the Dominion could not be dealt with by provincial legislation on civil rights alone. Hence a certain amount of difficulty arose as to the question of entry into the United Church, for a strong body of Presbyterian opinion, especially in the eastern provinces, where religion takes on a more particularistic type, felt unwilling to enter the new body. Authority was given by Dominion Act in 1924 for creation of the United Church, and six months before June 10, 1925, was allowed for any congregation to decline inclusion, in which case the church property was not to pass to the new body. In Nova Scotia an Act of 1924 gave authority to any congregation to join the United Church at any time after June 10, 1925, and St. Luke's congregation, which had originally in 1924 decided not to join, declared in July 1925 its desire to join. It was ruled by the Privy Council<sup>1</sup> that the choice under the Dominion Act ruled the position, for the right to enter the United Church or to remain out of it must

<sup>1</sup> *St. Luke's, Saltsprings, Trustees v. Cameron*, [1930] A.C. 673. For other cases see *Aird v. Johnson*, [1929] 4 D.L.R. 664, *Ferguson v. Maclean*, [1931] 1 D.L.R. 61.

be declared prior to June 10, 1925, and the provincial Act could not alter that fact, as it had proposed to do.

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Subsidies to churches have now generally been abandoned by Parliaments, though for a time the Australian colonies for the most part made grants in proportion to numbers of members of the several congregations. The Commonwealth of Australia is specifically forbidden to establish any religion or require a religious profession from a servant of the Commonwealth, nor may it interfere with the exercise of religion; but these rules are rather *pro forma* than of importance. In the case of the Irish Free State, however, the treaty of 1921 enjoins abstention from religious discrimination,<sup>1</sup> and the constitution by Article 8 provides that "freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be made either directly or indirectly to endow any religion, or prohibit or restrict the free exercise thereof, or give any preference, or impose any disability, on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects State aid between schools under the management of different religious denominations, or divert from any religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water or drainage works or other works of public utility, and on payment of compensation".<sup>2</sup> It must be presumed that, despite the disappearance of any

<sup>1</sup> The Roman Catholic Church law is in the Free State a foreign law, to be proved as in England, not part of local law as in Quebec: *O'Callaghan v. O'Sullivan*, [1925] 1 I.R. 90 (power of bishop to remove parish priest).

<sup>2</sup> For the power of control of schools in the parallel case of Northern Ireland, see *Londonderry County Council v. McGlade*, [1929] N.I. 47.

Chapter XVIII. Imperial Act to render this provision binding if the Irish Free State repealed the Imperial Act of 1922, the treaty and the constitution still governed the clause and prevented action contrary to it being valid, but the same issue arose as in the case of the abolition of the oath of allegiance.

The Constitution of Eire, however, renders it reasonable to suppose that nothing unfair will be done. The State acknowledges that the homage of public worship is due to God and its duty of respecting and honouring religion. It recognises the special position of the Roman Church as the guardian of the faith professed by the great majority of the citizens. But it also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends, and the Jewish congregations and other religious denominations existing at the date of the coming into operation of the constitution. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. The State guarantees not to endow any religion and shall not impose any disabilities or make any discrimination on the ground of religious profession, belief, or status. Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school. Every religious denomination<sup>1</sup> shall have the right to manage its own affairs, own, acquire, and administer property, movable and immovable.

<sup>1</sup> No doubt including the Jesuits: cf. *Byrne, In re; Shaw v. A.-G.*, [1935] I.R. 782. Religious equality, Mr. De Valera explained, was his concession to Northern Ireland as well as his refraining from declaring Eire a republic. On the position of the Church of Ireland see *Colquhoun v. FitzGibbon*, [1937] I.R. 565.

able, and maintain institutions for religious or charitable purposes. The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation. This excellent code certainly departs as little as possible from the terms of the pre-existing law.

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(3) A different fate has attended the Church of Rome in Quebec. British policy in 1774 confirmed it in its privileges and gave it legal powers to exact its dues from all Catholics, though not from Protestants. The effect of this concession which has been continued in all subsequent legislation, and is now regulated by provincial Statutes, is to give the church virtually the position of the established church of Quebec. Moreover, the law of Quebec continues much of the old ecclesiastical law. This favoured position has not gone without comment in the Dominion, and prolonged litigation and much bitterness were excited in 1869-75 by the controversy over the right of a Catholic who had been condemned for his opinions by the hierarchy to secure burial in a Roman Catholic cemetery. The Privy Council<sup>1</sup> decided the issue in favour of the right, based on a careful study of Quebec law, which later was altered. Even more acute for a time was the unrest caused by the assumption of some Canadian judges that the decree of the Pope known as *Ne temere* regarding forms of marriage altered automatically the law of Quebec. This contention was also disallowed by the Privy Council,<sup>2</sup> which took the opportunity to point out that the concession made to the church in 1774 did not continue the church in the plenitude of its former powers under a régime which did not even tolerate Protestantism;

<sup>1</sup> (1874), L.R. 6 P.C. 157 as *Brown v. Curé de Montréal*, Willison, *Sir Wilfrid Laurier*, 1 53-76

<sup>2</sup> *Despatie v. Tremblay*, [1921] 1 A.C. 702.

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but gave it a defined position which, but for Statute, would have been illegal. This judgment established that Quebec may legislate, if it pleases, to conform to papal injunctions, but that such injunctions are not part otherwise of the law of the province. The position is in a sense vital, because the province is inhibited from any rash legislation which might injuriously affect Protestants by the Dominion power to disallow; but, if the law were capable of automatic change by the Pope, the safeguard for moderation would be gone. The church dominates Quebec life, and its attitude towards Protestants is not badly revealed in the provincial Act of 1903 which classed Jews with them in school matters, or the argument of one judge in the case<sup>1</sup> arising out of that action that Jews were in the same religious category as Protestants, a rather interesting revelation of Christian charity. Striking also is the Act of 1888, which, to please the Pope, restored to the Jesuits the property confiscated on the conquest of Canada, although any claim to it had long been extinguished, either by the suppression of the order by the Pope in 1773, or the death of the last member of the Order in Canada in 1800. Strong as was feeling against the measure, the Dominion Government was upheld by the Commons in its refusal to interfere in a decision which was one for Quebec to make as it pleased.

(4) Sectarian feeling has intervened in politics mainly through the claims of the church in Quebec to govern the politics of its adherents. The issue was bitterly disputed during the period from 1873 in Canadian politics when the hierarchy was opposed to the Liberal party. At the Charlevoix bye-election the curés used undue influence and spiritual and temporal intimidation freely. Yet, when the election of Mr. Langevin was attacked on this score,

<sup>1</sup> *Hirsch v. Montreal Protestant School Commrs.*, [1928] A.C. 200.

Routhier, J., held that he had no jurisdiction to censure a priest on account of the exercise of his duty to advise parishioners in accordance with the views of his superiors. He accepted the view that an ecclesiastical person was not subject to the jurisdiction of a civil court without the sanction of his spiritual superior. This view was rejected by the Supreme Court, Taschereau, J., and Ritchie, J., both negating the doctrine of ecclesiastical immunity and the superiority of the church to the laws of the land.<sup>1</sup> The same view was taken by Casault, McCord, and McGuire, JJ., in holding void in 1876 the Bonaventure election in Quebec on the ground of spiritual penalties being threatened against those who voted for the Liberal, with the approval of the Conservative candidate. Efforts were made by the Pope to inculcate moderation on the ecclesiastical authorities, and, after a visit of Mgr. Conroy as apostolic delegate in 1877, the bishops issued instructions which should have prevented a repetition of the earlier tactics. None the less, in 1878 the election at Berthier was reversed on the ground of the use of spiritual threats to intimidate the voters, a policy used successfully in 1932 in Malta. Much vehemence was shown in 1896 in the controversy over the Manitoba education question,<sup>2</sup> but Sir W. Laurier succeeded in winning a victory, despite the efforts of the hierarchy to secure a majority for the Conservative Government in gratitude for its efforts to coerce Manitoba. Sir W. Laurier succeeded, however, at no distant date in winning popularity by his adjustment with Manitoba of the education question, and he placed Catholics under considerable obligations by his

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<sup>1</sup> Wilson, *Sir Wilfrid Laurier*, i. 253-96, *Brassard v. Langevin* (1876), 1 S.C.R. 145

<sup>2</sup> Skelton, *Sir Wilfrid Laurier*, i. 440-85, n. 16; Wilson, *op. cit.* n. 202 ff., 259 ff., Dafoe, *Clifford Sipton*, pp. 36-47, 61-100.

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insistence against the wishes of many in his own party in forcing denominationalism on Saskatchewan and Alberta in 1905 when they were given provincial status.<sup>1</sup> The church has in later years moderated the vehemence of its claims, but the substance of its control over the faithful has in no wise been reduced, nor is there any doubt that it is to the church that Quebec owes the preservation and extension of the French Canadian race.

In New South Wales and Queensland Roman Catholic influence is strong and has on the whole favoured the Labour party, for many of the Catholics are Irish, who are disloyal to the Imperial connection and see in the Labour party the most promising material for carrying out the aim of detaching the Commonwealth from the Empire.

The settlement of the Irish question of 1921, which in considerable measure affected for the better the relations of the United States with Britain, has not made much difference in the attitude of the Irish malcontents in Australia, but it has had some effect in Canada. Moreover, the Roman Catholic Irish in Canada are not now in close relations of co-operation with their French-Canadian co-religionists. There has indeed been little cordiality between the two sections of the Roman Catholic population, and instead a good many squabbles. A rather unfortunate phenomenon has lately appeared in Quebec through the development of a strong movement towards a Corporative Fascist State under clerical inspiration and domination. Cardinal Villeneuve, Archbishop of Quebec, has given it his blessing, and is credited with being the most potent influence in support of a movement which patently desires to undermine the

<sup>1</sup> Skelton, *op. cit.* II 224-47, Willson, *op. cit.* II 369-80, *R. (Brooks) v. Ulmer*, [1923] 1 D.L.R. 304; *Alberta Act, Section 17, In re*, [1927] S.C.R. 364, assert the validity of the limitations put on provincial power.

liberty of the press, of speech, and of assembly, and which seeks to establish corporative institutions in which the workers would be under clerical control, and all Socialist and Communist propaganda should be barred. The intolerance of the new movement, behind which are the St. Jean Baptiste Society of Montreal and L'Action Corporative Nationale, has already elicited the formation of the Canadian Civil Liberties Union, for the Liberals of the province, crushed in the general election of 1936, have made ineffective protest against the measures passed to control the expression of opinion under the plea of sedition, and to give the Government the right to declare what organisations of Labour shall be accorded the right to enter into collective agreements with the employers, which may be made binding over prescribed areas of the province and imposed on employers and employed in similar occupations by executive decision. Perhaps the most unsatisfactory feature of all is the fact that Liberal opposition is said to have been precluded by the fact that the Premier allowed it to be known that the Cardinal had approved his legislation. It is perhaps inevitable that the church should be militant to preserve Quebec for the faith, when it is being assailed in so many different places, but it is permissible to regret that there should appear to be a movement reminiscent of the earlier period above described, and of the recent events in Malta<sup>1</sup> where ecclesiastic influence was patently exercised in the interest of a faction hostile to the just authority of the British Crown.

It is in the sphere of the teaching of religion in schools that political struggles have chiefly centred. Reference has

<sup>1</sup> Keith, *Letters on Imperial Relations, 1916-1935*, pp. 292-4. In the war of 1914-18 and now Roman Catholic influence has tended to approve isolation and refusal to co-operate with Britain or to strengthen defence.

Chapter XVIII. already been made to the issue in Canada; how much alive it is may be seen from the bitterness of the denunciation of Saskatchewan for forbidding in its ordinary schools the display of religious emblems in 1930. In Australia the principle that children shall have some form of religious instruction, unless their parents object, is accepted in New South Wales; in Queensland, where it was insisted on by the voters at a referendum of 1908 in the teeth of the Government of the day; in Tasmania and in Western Australia, but not in South Australia or Victoria; while New Zealand has been acutely divided on the issue, but without effect so far. In the Union of South Africa schools are opened with prayer and Bible reading. The teaching of Bible history is permitted subject to a conscience clause, but no doctrinal or sectarian instruction is allowed, save in the Cape province under conditions laid down in an Ordinance, No. 5 of 1921, chap. 23. In the Irish Free State, of course, denominational education is largely prevalent. The safeguards on this head in the Constitution of Eire have been noted above.

## CHAPTER XIX

### HONOURS AND PRECEDENCE

(1) It has already been pointed out that, so long as Dominion officials and residents are anxious to receive honours with Imperial value, the Governments of the Dominions, despite their new status, cannot expect that their advice shall prevail with the King without the assent of the Imperial Government, within whose functions the control of this prerogative still lies. The rule prior to the evolution of Dominion status was simple. The Government of a Dominion or State could recommend for honours, but the Governor-General was expected to comment on such recommendation, and he was not debarred from himself suggesting names when the honours were not intended to be awarded for political services. It was in fact obvious that for the British Government to reward in this way a political enemy of the Dominion Government would be highly unwise. In the case of the States the Governor-General personally was also requested to give his opinion, chiefly from the point of view of the comparative claims of persons recommended by the different States.

In the case of Canada the award of honours fell into disrepute during the war, partly owing to the unwise generosity of grants, partly owing to the innovation of including hereditary honours such as peerages, and the unpopularity of two of the recipients of these honours. The Government of Sir R. Borden did not wholly share the

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view of the people, and drastic action was forced by the voice of the back-bench members of the House of Commons, whom the ministry dare not defy. An address was voted to the Crown in 1919 "to refrain hereafter from conferring any title of honour or titular distinction on any of your subjects domiciled or ordinarily residing in Canada, save such appellations as are of a professional or vocational character or which appertain to an office". It was further requested that every hereditary honour held by a person domiciled or ordinarily residing in Canada should be made to terminate on his death. The latter request was not formally acted upon, as the proposal would have required an Imperial Act, but the former was religiously observed. The rule was resented by those circles in which honours were held in value, but an effort favoured by the leader of the Opposition to secure a reversal in 1929 of the decision failed decisively, and only when Mr. Bennett obtained power did he risk renewing the system. His action was unsatisfactory,<sup>1</sup> and the probability of the new Government risking popularity in the democratic West by insistence on change is small.<sup>2</sup> The presence of the United States in close proximity has an inevitable effect in rendering honours unpopular.

The decision of the Dominion has been deliberately homologated by the Union of South Africa,<sup>3</sup> and it is the rule adopted by Labour Governments in the Commonwealth and the States. Other Governments do not adopt this system, with the result that, as honours can hardly be refused on

<sup>1</sup> See the debate Jan. 29, 30, 1934, where Mr. Mackenzie King exposed the unconstitutionality of Mr. Bennett's action, which would have led to additional corruption in Canadian politics. It was only by 113 to 94 votes that on March 14, 1934, a motion against honours was defeated.

<sup>2</sup> No coronation honours were given to Canada.

<sup>3</sup> The Governor-General, P. Duncan, was, on the other hand, given the G.C.M.G. with General Herzog's approval.

personal grounds to ministers of a certain status, the list of persons decorated for Dominion services is not altogether satisfactory. There is no general agreement in those Dominions where honours are still awarded as to the wisdom of the procedure.

There is no restriction to any one form of honour. Peerages and baronetries are unquestionably undesirable in view of the clear sentiment of the Dominions that, even assuming that merit should be rewarded in life in this manner, perpetuation is undesirable. Mr. Bruce, as Prime Minister of the Commonwealth, received the C.H., but this is nearly isolated. Formally the various ranks of the Order of St. Michael and St. George (Knight Grand Cross, Knight Commander, and Companion) are awarded, but the different ranks of the Bath may be given, not to mention the less distinguished Order of the British Empire and the Imperial Service Order. Knighthood is considered appropriate to judges. The Victorian Order, unlike these other orders, is a matter in which the King acts on his personal discretion, and he may award it for some service in regard to the Dominions which he considers sufficiently personal to deserve recognition. In other cases the award is made on the submission of the appropriate minister, the Prime Minister, or in the case of the St. Michael and St. George, the Dominions Secretary.<sup>1</sup> Honours for persons of Dominion origin, but serving in the British defence forces, may be accorded on the recommendation of the appropriate department, and are not excluded even as regards Canadians or South Africans, nor are honours barred in the case of persons connected with the Dominions, but ordinarily resident in the United Kingdom; but in such cases services should be rendered in matters not concerning the Dominions.

<sup>1</sup> Subject to the Prime Minister's supervision.

Chapter XIX. The rule is neatly expressed in Article 5 of the Irish constitution:<sup>1</sup> "No title of honour in respect of any services rendered to, or in relation to, the Irish Free State may be conferred on any citizen of the Irish Free State, except with the approval of, or upon the advice of, the Executive Council of the State". It will be noted that here as usual the Governor-General was ignored, though normally at the time when the constitution was enacted his advice would have been an important factor to be considered by the Imperial Government before acting on the advice tendered to it.

The Canadian resolution excludes the use of appellations which mark the tenure of office. Thus there is no objection to the holding of British Privy Councillorships by members of the Dominion Cabinets, though General Herzog has declined the honour. The style Honourable is therefore used in Canada as in the rest of the Dominions. It is borne by all members of Executive Councils (including the Privy Council of Canada, for which Sir J. Macdonald vainly sought the style of Right Honourable); all members of Legislative Councils (save that of Quebec); Canadian and Union (but not Australian) Senators; and Speakers of the lower house of the legislatures, and the same style is given to judges of the Supreme Courts in the Dominions. On retirement from office, the style may be granted by the Crown to ex-ministers who have served for three years on an Executive Council, or one year in the office of Prime Minister; to Presidents of the upper houses, and Speakers of the lower houses after three years' service; to members of the upper houses after ten years' service; and to judges of the Supreme Courts. These styles are recognised by direction

<sup>1</sup> The Constitution of Éire (Art. 40 (2)) forbids the State to confer titles of nobility and requires the prior approval of the Government for acceptance of foreign honours.

of the Crown throughout the Empire.

The style of a Governor-General is His Excellency; his wife is Her Excellency; a Governor His Excellency, and an officer administering the government is in like case. The Lieutenant-Governors of the Canadian provinces are styled His Honour, and the same style is sometimes used elsewhere, but the Administrators of the provinces of the Union are Honourable. In 1927 it was provided and intimated by Canadian Order in Council, that Lieutenant-Governors in the provinces should be entitled to the style Honourable during office and for life after retirement.

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(2) Precedence like honours is a matter of the royal prerogative, but there is an important distinction between the two cases Honours are Imperial, and involve the advice of the British Government. Any Dominion<sup>1</sup> may, of course, create an honour and authorise the Governor-General to bestow it, as does Quebec<sup>2</sup> the Order of Agricultural Merit; but such honours at present would not be as highly valued as British honours, though in the Irish Free State the possibility of legislation has been discussed.<sup>3</sup> In regard to precedence the matter is local, and there is now no ground why the matter should not be determined solely by the advice of the ministry. It depends in fact on various grounds; there is no reason why it should not form the subject of enactment, and judicial precedence has been so regulated with inconvenient results; as a rule it is determined under the prerogative by the approval of lists by the King,

<sup>1</sup> The only difficulty would be as to legislative power in the federations. It is not certain that the Dominion could legislate as a title may be a civil right on property (*Rivett-Carnac's Will, In re* (1885), 30 Ch.D. 136, *Lord Advocate v. Walker's Trustees*, [1912] A.C. 95. See Kennedy, *Can. Bar Review*, xii. 375 ff.

<sup>2</sup> Act c. 33 of 1925

<sup>3</sup> See Constitution of Éire, Art. 40 (2), for the Union see p. 668, *post*. In the original draft for Éire Orders of Merit were expressly contemplated, but that was omitted finally, but they are not forbidden.

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as in the case of the Commonwealth in 1903, the Union in 1910, and Canada in 1923. Where there is no definite list, the Governor-General can regulate the matter, unless authoritative usage has restricted his discretion. Legally, persons who by birth or title have precedence in the United Kingdom cannot claim any precedence in the Dominions; if accorded, it is by courtesy, and in any case it is the rule that all officers, naval, military, or civil, must rank by office, and that their wives follow their status, not any they possess in the United Kingdom by birth, a rule reminiscent of a time when quarrels on precedence between the wives of high officials were not unknown. Curiously enough, there has been in Canada of late a revival of ceremonial, some of the usages of the British Court having been introduced by the Governor-General, in striking contrast to the régime of the Duke of Connaught as Governor-General or that of the Marquis of Lorne.

Ecclesiastical precedence has ceased to cause serious trouble since the rule of preferring bishops of the Church of England was abandoned, and all bishops rank by date of consecration, and archbishops take precedence of them on the same basis of consecration as archbishop. In all cases ecclesiastical precedence is by courtesy. The long-fought-out battle over precedence of naval and military and air officers is disposed of by adopting the date of commission to the rank in question as decisive.

In the Commonwealth as usual there are difficulties, because the States and the Commonwealth have each their own lists, and these conflict in detail. The Commonwealth places State Premiers below its own ministers, while the States claim precedence over such ministers after the Prime Minister of the Commonwealth, and similarly as regards State and Commonwealth justices. The issue should

be of negligible concern, but some difficulty is caused to those arranging functions who desire to prevent friction. This, however, has been rendered of minor consequence, since the removal of the federal capital to Canberra has taken away the concurrent presence of the Governor-General and Governor in Melbourne or Sydney.

Members of the royal family while in a Dominion are given precedence after the Governor-General unless preferred to him by special order of the King. The matter seems sufficiently disposed of by considerations of the courtesy extended to a royal guest.

(3) The grant of medals to the forces of the Crown is properly regarded as a matter in which the Crown is personally concerned, and accordingly the royal authority is sought for the issue of medals, and has been granted under royal warrant. The conditions of issue can, of course, be regulated by local legislation and regulations under such legislation, but the royal authority gives the medals validity beyond the boundaries of the Dominion concerned. Similarly, in order to have a clear right to wear a foreign decoration or medal, the royal pleasure must be obtained through the Secretary of State for Foreign Affairs.

The royal authority is also decisive regarding the right to wear civil uniforms of the five classes, which are allocated according to status between ministers and departmental officers, the rules as to visits between naval officers and Governors, and salutes on the occasion of visits or of the opening and closing the legislatures. In point of fact no doubt these matters will be ordered as desired by ministers, but the Crown is formally the decisive authority, and, where the matter concerns the British navy, possesses the sole right to issue direction to officers of the fleet.

As a marked sign of the new relationship of the Governors

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General to the Crown, the right has been accorded to them to have special flags of their own as distinct from the use of the Union Jack, with or without the distinctive sign of the Dominion or the Dominion flag. This decision involves the cessation of any use in the Dominions of the royal standard, the personal flag of the King, and effect was given to it in 1931 in the case of the Union Parliament by substituting the use of the Governor-General's flag during his presence there for that of the royal standard.

(4) It should be noted that, by proclamation of the King, No. 5 of 1935,<sup>1</sup> among the instruments which are to bear the Union signet provided for by the Royal Executive Functions and Seals Act, 1934 (ss. 1 and 4), are specified those "regulating the Institution and Conferment of Honours, Orders, Decorations, Medals, and Coats of Arms". This is a very interesting assertion of the right of the Union as a sovereign State to use the royal prerogative to create such matters as those referred to, nor of course is there any possible legal objection to the claim. Further, if the King were to demur, the necessary action could, under the Royal Executive Functions and Seals Act, 1934 (s. 6), be taken by the Governor-General on the authority of the ministry.

As has been noted above, the Irish Free State's new constitutional proposals contemplate at most the creation of Orders of Merit only, which of course will be unconnected with the Crown.

<sup>1</sup> *Government Gazette*, Jan. 11, 1935. The Government of Eire has full power to exercise any royal prerogative under Art. 49 of the Constitution, to the exclusion of the King save as specially provided.

## CHAPTER XX

### THE DOMINION MANDATES AND DEPENDENCIES

MENTION has been made above of the constitutional arrangements affecting the case of New Guinea under mandate to the Commonwealth of Australia, of Nauru mandated to the British Empire, and of South-West Africa under the control of the Union. There remain to be considered (1) the mandate of New Zealand and (2) the attitude of the Dominions towards the control of the League of Nations through the Permanent Mandate Commission.

(1) New Zealand, in accepting the mandate for Western Samoa, differed from the Union and the Commonwealth in her estimation of the mode of constitutional action necessary to give her legal rights over the territory.<sup>1</sup> In the Union it was held that the grant of the mandate to the King to be exercised on his behalf by the Government of the Union invested the Union with the necessary authority independently of any further grant, and the Parliament of the Union was declared by the Speaker to be inherently capable of legislation, despite the fact that the territory was beyond colonial limits, nor has that ruling been questioned in the courts. In the case of Australia it was believed that the Crown might, under Section 122 of the constitution, by according to the Commonwealth the mandate, enable it to exercise full authority, though the High Court seems rather to rely on the Imperial Act of 1919 approving the

<sup>1</sup> Keith, *War Government of the British Dominions*, pp. 182 ff.

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Treaty of Versailles. In New Zealand Orders in Council under the Foreign Jurisdiction Act were obtained in 1920, under which the power of government in the fullest sense in the terms of the mandate was conferred on New Zealand. The constitution of the territory rests, therefore, on New Zealand legislation, which is very elaborate. But the essential feature is administration by an Administrator appointed by the Governor-General and responsible to the Minister of External Affairs. There is a Legislative Council composed of the Administrator, four to six nominated official members appointed by the Governor-General, two Europeans elected by the European population, and two natives of Samoa chosen by the Governor-General. With this body, which can always be controlled by the Administrator, he can legislate for the territory, subject to disallowance by the Governor-General. There is also created a High Court over which the Supreme Court of New Zealand has control, and that Court has also authority over Samoa.

As a sign of the evolution of Dominion views of the rights of the Government of New Zealand it may be noted that, in two judgments<sup>1</sup> of the Supreme Court the view has received support that without the Order in Council New Zealand has authority, but, as the Order in Council stands and plainly cannot be deemed invalid by any court, it does not appear that this theoretic discussion, which has been taken up by Evatt, J., in the Commonwealth of Australia, as noted above, has any particular value. It is perfectly clear that the courts are satisfied of the full right of New Zealand to legislate for and administer the territory, and

<sup>1</sup> *Tagaloa v. Inspector of Police*, [1927] N.Z.L.R. 883, *Tamasase, In re*, [1929] N.Z.L.R. 209, *Keith, Journ. Comp. Leg.* xi. 260-2; xvi. 295, *Nelson v. Brasby* (No. 2), [1934] N.Z.L.R. 559

there is no reason whatever to assume that the Privy Council would dissent from this view, if it thought fit in any case to allow an appeal<sup>1</sup> to be brought from the decision of the Supreme Court of New Zealand when exercising its jurisdiction over that territory, whether by appeal or otherwise. It has indeed been held by the Supreme Court<sup>2</sup> that it has no power to give special leave to appeal from its judgment on a Samoan issue to the Privy Council, as its jurisdiction is derived solely from the terms of the Samoa Act, 1921, which does not permit of any appeal being allowed. But that does not touch the right of the Privy Council to admit an appeal by special leave if it so thinks fit. The issue is concluded by the fact that in respect of Palestine, whose constitutional position is exactly like that of Samoa as resting on British Orders in Council, the right to regulate and allow appeals has been definitely asserted by the Privy Council.<sup>3</sup>

(2) It is natural that the Dominions have not found altogether happy their relations with the League of Nations and in special with the Permanent Mandates Commission, which is so constituted that a majority of the representatives speak for powers which have no mandates, and therefore can speak without the reserves inevitable in the case of critics who are liable to counter-criticism. The control of the League is slight, but the necessity of rendering an annual report and of explaining issues to the Commission, which reports to the League Council, compels the Dominions to permit their conduct of government to be the object of investigation and some measure of criticism, which has been strongly resented in the Dominions for various

<sup>1</sup> Cf. *Nelson v. R.*, [1928] W.N. 197, where leave to appeal was not granted.

<sup>2</sup> [1934] N.Z.L.R. 636.

<sup>3</sup> *Jerusalem and Jaffa District Governor v. Suleiman Murra*, [1926] A.C. 321.

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reasons. The Dominions have for so many years been exempt from criticism, whether official or unofficial, in the United Kingdom in respect of their management of their territories, that criticism from without appears rather intolerable. Secondly, the Dominions had expected to have the territories in question allocated to them in full sovereignty, exempt from all conditions, and they have naturally endeavoured so to manage the position that the result which was legally denied shall be made real in practice. It is, however, satisfactory that on the whole a due sense of obligation has marked the attitude of the Dominions, as assuredly it has that of the United Kingdom as a mandatory.

The difficulty in every case for the mandatory has been the fact that the mandate has been conferred on terms, necessitated by the magnificent sentiments of the Covenant of the League, Article 22, which have placed the mandatory power in the position of being obliged to govern the natives essentially as a trustee, and not as an owner of territory and sovereign over the people by right of conquest. The difference between such a position and that of the ordinary power holding colonial territories is very striking, and the natives of Western Samoa, for example, are far too highly educated in matters political for their leaders not to be able to exploit the facts, especially as the native population had among its leaders many men of mixed blood who doubtless quite sincerely believed in the capacity of the Samoans under their guidance to govern themselves.<sup>1</sup> In the case of New Guinea again the position was complicated by the fact that Germany had had a hold there, and the natives were not in the position of welcoming liberators but were

<sup>1</sup> J. B. Condliffe, *New Zealand in the Making* (1930), Chap. XIII; *New Zealand Affairs* (1929), pp. 179 ff.

reluctant to accept new masters. But the most serious difficulties of all confronted the Union of South Africa, because of the character of the territory, of the natives, and of the pre-existing European population and the possibility of European settlement, involving elements lacking in New Guinea or Samoa.

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Mention has already been made of the rather barren issue raised between the Union and the Permanent Mandates Commission and the Council regarding sovereignty,<sup>1</sup> the net outcome of which may fairly be summed up as showing that the Union possesses the substance but not the right to the name. Much more serious was the friction caused by the reluctance of the natives to accept the rule of the Union. They had resisted the German control, and they had expected to attain freedom when it was removed.<sup>2</sup> The reckless and destructive use in May 1922 of air bombing to reduce the Bondelzwarts to submission was a sinister episode which raised natural anxiety in the Mandates Commission, not allayed by the shifts and evasions by which General Smuts' Government endeavoured to lessen the disgrace justly incurred by such methods of barbarism practised in the name of the establishment of civilisation.<sup>3</sup> It is hardly surprising that the Commission was imbued with an unfair conception of the Dominion point of view, and was induced to over-critical examination of all British mandates.

The essential difficulty, of course, was that the mandatory system was devised on the basis of trusteeship for natives, as in Togoland, the Cameroons, New Guinea, or even in large measure Tanganyika, and could not be squared with the conditions of South-West Africa with some 7000

<sup>1</sup> See p. 540, *ante*

<sup>2</sup> They regarded themselves as allies whose services were ill repaid.

<sup>3</sup> For an effort to minimise see Manning, *British Dominions in the League of Nations*, pp. 111 ff.

**Chapter XX.** Germans and 10,000 British South Africans whose interests must at least receive full consideration. The Union, however, went further. The Government held that the European population should be allowed to enjoy the same position as it already enjoyed in the Union, that of superiority to the natives, who should be made to serve as the basis of European prosperity, deriving thence ultimately profit for themselves also. This conception runs entirely contrary to the ideal of mandatory guardianship, and explains the whole of the difficulties which have manifested themselves. The issue was really definitely raised in 1923, when Germany accepted and the League was induced to consent to the automatic naturalisation as British subjects of the whole of the German population unless any person specifically desired to remain a German, the assent of Germany being obtained by the promise *inter alia* to permit for certain purposes the use of the German language. Of 2000 German male adults 1700 accepted the new status. Yet the action of the Union was only really consistent with the idea of exercising sovereignty over the territory, and this was revealed in the controversy over the use of the term which has already been mentioned. What is surprising is the fact that the Mandates Commission at one time realised that its action in accepting naturalisation would be a distinct impetus to assumption of sovereignty, and yet was so displeased at the use of the term.

The Bondelzwarts episode produced a certain strain between the League Mandates Commission and the Union Government; only special pleading can justify the attitude of the Union in the matter, though the difficulties of its position were great, seeing that it held a view of native rights very different from that of the Mandates Commission. To this friction may be ascribed the acerbity with

which the Dominions opposed the terms of the questionnaire which in 1926 the Commission desired to have used in eliciting information from them as to their policy towards the mandated territories.<sup>1</sup> Sir A. Chamberlain was induced to support their objections, and the proposal was dropped, though other mandatory powers saw no objection to giving the information desired, and in fact the Dominions have regularly sent most of what was asked for, revealing the artificial character of their protests in 1926. Much more reasonable was their objection to the Commission attempting to hear petitioners against the mandatory power in person, a procedure which would have unquestionably given a false impression of the status of the mandatory.

New Zealand<sup>2</sup> more recently has had to explain in detail the unfortunate events in Samoa, and has found sympathetic understanding of her difficulties, and even the suggestion that her policy may have been too lacking in firmness. But it must be remembered that in the case of New Zealand it is clear that her interest in Samoa is largely disinterested, and that her conception of her duty differs entirely from the determination of the Union ultimately to amend the Treaty of Versailles by annexing the Union as a fifth province. The League, however, must consent to any such change, and Germany has a clear right to claim the position of a mandatory<sup>3</sup> in view of the fact that her native policy has been followed in principle by the Union administration, though happily with considerably more moderation and humanity.

In the case of Nauru the anomaly of the ownership of the Empire added to trusteeship for the natives caused at first

<sup>1</sup> Parl. Pap. Cmd. 2767

<sup>2</sup> The Labour Government of 1936-7 made very conciliatory concessions.

<sup>3</sup> General Hertzog originally declared the mandate "a scandalous piece of international fraud" (*J.P.E.*, 1921, p. 909).

**Chapter XX.** considerable difficulty. The Mandates Commission, however, soon learned to understand the position, and the value of its comments has not been negligible. It has been made clear that the legislative authority of the Administrator is subject to the control of the Commonwealth Government, and that due care is being taken to provide for the future of the natives of the island in view of the danger done to it by the operation of phosphate removal. The fact of ownership secured by purchase has been recognised as definitely authorising the monopoly of exploitation which accrues to the Empire. Nor has the Commission been unsympathetic towards the problems confronting the Commonwealth in the slow task of civilising the people of New Guinea. The mandates have unquestionably served to accentuate the position of the Dominions as autonomous members of the League, for it has been made absolutely clear that the British Government had no responsibility for, or control over, their conduct of the matters entrusted to their care.

One issue of importance, however, has arisen regarding the doctrine of the exclusion from the case of the Dominion mandates of the principle of equality of treatment of all members of the League. The result is that the Japanese are less favourably situated as regards immigration into these territories than they were under the former régime applicable to them. Of minor importance is the complaint made that the Union has insisted on missionaries undertaking, as a condition of being permitted to work among the natives of South-West Africa, that they will inculcate the duty of natives undertaking work for Europeans. This doctrine is of value for the Europeans, but there is no reason to suppose that it is in most cases beneficial to native society or to the individuals concerned.

(3) Mention has already been made of the dependencies which are administered by the Commonwealth of Australia.<sup>1</sup> New Zealand has, since June 11, 1901, included in its boundaries the Cook and Niue<sup>2</sup> Islands, which are provided with a somewhat elaborate system of local government.<sup>3</sup> Island Councils are provided, consisting of *ex officio*, nominated, or elective members, officials and native chiefs sitting *ex officio*, nominated members being selected by the Governor-General, and elected members including women, who share the vote with men. The Europeans of Raratonga elect one representative to the Council of that island. The Councils have a power of legislation for each island, but are bound by Dominion laws and regulations thereunder. They may not impose customs duties, borrow money, appropriate expenditure otherwise than out of revenue raised under their laws, establish Courts of Justice, or impose penalties exceeding three months' imprisonment or £50 fine. Any Ordinance must receive the assent of the Resident Commissioner or the Governor-General, and, if assented to by the former, may be disallowed within a year. A High Court is established whose judges and Commissioners are appointed by the Governor-General. It has full jurisdiction, subject to appeal to the Supreme Court of New Zealand, and the latter executes its judgments in civil cases in the Dominion, as in the case of Samoa. As in Samoa also, there is absolute prohibition of the manufacture or importa-

<sup>1</sup> See Chapter XII (10), *ante*. For the High Commission Territories in South Africa see Chapter XIV (5).

<sup>2</sup> Niue has its own Resident Commissioner, who is, for obvious motives of convenience, placed under the control of the Minister of External Affairs (Act No. 21 of 1932).

<sup>3</sup> Cook Islands Acts, 1915 and 1921, the Minister for the Cook Islands has control. The office in 1937 was held by the Prime Minister, who, as Minister of External Affairs, controls Western Samoa.

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tion of intoxicating liquor save for medicinal, sacramental,  
or industrial purposes.

By an Order in Council of July 30, 1923, under the British Settlements Act, 1887, the Ross Dependency, lying south of the 60th degree of south latitude and between 160° E. longitude and 150° W. longitude, was declared to be a British settlement and the Governor-General of New Zealand was made Governor, with full power of administration and legislation. In the exercise of this power the laws of New Zealand have been declared to apply to the territory. It seems, however, clear that the delegation of power to legislate is *ultra vires*,<sup>1</sup> on the score that the Act of 1887 authorises delegation only to three or more persons within the settlement. The absence of any permanent population renders such delegation difficult, but the irregularity of the procedure has been canvassed in New South Wales.

Since February 11, 1926, New Zealand has accepted the control of the Tokelau or Union group of islands on the score of convenience of administration from Apia. The islands were formerly connected with the Gilbert and Ellice Islands,<sup>2</sup> now a British colony by cession, and their administration is mainly in the hands of chiefs, aided by native village councils.

<sup>1</sup> Keith, *Responsible Government in the Dominions* (ed. 1928), II 1039, 1040; Charteris, *Journ. Comp. Leg.* xi. 228 ff.

<sup>2</sup> Two Orders in Council of Nov. 4, 1925, were required, one to disannex, under the Colonial Boundaries Act, 1895, and one to transfer the control to New Zealand. The latter may be deemed valid on the score that the islands are colonies by cession by their people, as in the case of Malta, Fiji, Kenya, etc.

## CHAPTER XXI

### IMPERIAL CO-OPERATION

THOUGH autonomy is essential to the Dominions, their attitude to the other parts of the Empire is no less essentially positive, and in many ways they engage in important co-operation.

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(1) The chief form of that co-operation is seen in the institution of the Imperial Conference. Its constitution, as laid down in 1907, comprises the Prime Minister of the United Kingdom as President, the Secretary of State for Dominion Affairs, and the Prime Ministers of the Dominions, to whom was added in 1923 the representative of the Irish Free State. India was admitted as a full member by agreement of 1917. Its normal time of meeting is every four years, but with provision for subsidiary Conferences as may be requisite. Each unit has only one vote in discussions, and, though the number of ministers of each Government is not limited, it is expected that not more than two will speak.

In point of fact the resolutions of the Conferences are of absolutely no binding force,<sup>1</sup> in the strict sense of the term. It is a Conference of Governments responsible to Parliaments, and the obligation which agreement to a resolution implies is not absolute. A Dominion Government must no doubt desire to carry into effect any resolution to which it has agreed, for obviously the value of Conferences becomes

<sup>1</sup> Asserted categorically by Mr. Mackenzie King, House of Commons, Canada, Feb. 18, 1937; *J.P.E.*, 1937, pp. 324, 325.

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The resolution of 1907 provided for a Secretariat to maintain communication between Conferences, and it was duly created, but it has been merged in the Dominions Office Staff, the Secretary of State for the Colonies having been made also Secretary of State for Dominion Affairs in 1925; in 1930 separate appointments were made to the two offices, which have Parliamentary Under-Secretaries of State.<sup>1</sup> The Dominions Office serves as a channel of correspondence with Dominion Governments, but the right of Prime Ministers in the Dominions to communicate direct with the Prime Minister remains unaltered. Communication

<sup>1</sup> The offices are in one building and interchange of staff is allowed—rather anomalously. The independent work of the Dominions Secretary is clearly small.

may take place either direct with Dominion Ministers of External Affairs, or through the High Commissioners of the Dominions in London. In the Dominions the Governor-General of New Zealand and the Governor of Newfoundland still serve as channels of communication, but High Commissioners for the United Kingdom have been appointed in Canada, the Union, and in Australia. Their services as maintaining personal touch were much in evidence in the abdication crisis in December 1936.

The Conference has always combined political and economic issues in its investigations, and it was from its deliberations that there have proceeded the resolutions on status which brought about the passing of the Statute of Westminster, 1931, and the present understandings regarding foreign relations which are the foundation of the position of the Empire in international affairs. The report of the Conference of 1926 was, curiously enough, never formally approved by the Imperial Parliament, but it may be taken by subsequent action by that Parliament to have received full endorsement. The Dominions all consented to and applied for the enactment of the Statute of Westminster, and they may fairly be said to have approved as formally as is practicable the resolutions of the Conferences of 1926–30. The constitution of the Empire thus rests on these agreements and on their approval by the Parliaments as the working basis of its practical operation. No doubt it would be possible to throw the agreements into the form of treaty obligations, but any such action is contrary to the view of the British Government, which, as has been seen, insists that the relations between the parts of the Empire are not governed by the ordinary rules of international law, and therefore does not approve their being stated in such a form. Moreover, it is clear that to stereotype these relations

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in their present inchoate and undeveloped state would be both difficult and unwise. The flexibility of the British constitution suggests that the same quality should be safeguarded for the constitution of the Commonwealth or Empire. It is significant that Mr. Baldwin's earnest address<sup>1</sup> to the Empire Societies, May 24, 1937, stressed with much seriousness the desirability of maintaining flexibility in the relations *inter se* of parts of the Commonwealth. "Do not let us put any of our constitutions in a strait-waistcoat, because strangulation is the ultimate fate. . . . It was the attempt to define that split the Christian Church into fragments soon after it came into existence. It has never come together, and if we try to define our constitutions too much we may split our Empire into fragments, and it may never come together again. Politically if ever a phrase were true, it is this, 'The letter killeth, and the spirit giveth life'. These are the results of my meditations over many years."

With this considered opinion may be compared the assertion of Mr. Mackenzie King at the conclusion of the Conference of 1937, speaking of the nature of the Conference.<sup>2</sup> "Its function is not to formulate or declare policy.<sup>3</sup> The value of this, as of other Imperial Conferences, lies mainly in the free exchange of information and opinion, in furnishing the representatives of the several Governments with more adequate knowledge of the problems, the difficulties, the aspirations, the attitudes of other members of the British Commonwealth of Nations; and in giving that direct and immediate understanding of the national and

<sup>1</sup> *United Empire*, xxviii. 344.

<sup>2</sup> Parl. Pap Cmd. 5482, p. 63.

<sup>3</sup> A searching criticism of the constitutional resolutions of 1926-30 and the Statute of Westminster was given by Mr. Menzies, on moving the Adoption Bill in the Commonwealth Parliament, Aug. 25, 1937, when he stressed the difficulty of reconciling independence and the duties of membership of the Commonwealth (*J.P.E.*, 1937, pp. 864 ff.).

personal factors in the situation which cannot well be obtained by correspondence or indirect communication. With this further knowledge in their possession the representatives of each Government, in consultation with their colleagues and their respective Parliaments, are in the best of positions to formulate policies on questions where co-operation is required".

This very clear exposition of the narrow function of the Conference explains, on the one hand, why it is possible to intermit it for considerable periods, and the failure at that of 1937 to attempt to reaffirm the original proposal for four-yearly meetings. On the other hand, it ought to minimise the curious suspicion of the Conference which still exists in the Dominions, and which had something to do with the refusal of Mr. De Valera to attend the session of 1937, which otherwise was marked by the presence as observers of two ministers from Southern Rhodesia and the Chief Minister of Burma.

(2) For legislation on subjects of common interest to the Empire the Dominions in the past have been indebted to the Imperial Parliament. It still remains open after the Statute of Westminster, 1931, for the same mode of action to be adopted, but, as there is divergence of view among the Dominions as to the desirability of thus emphasising the Imperial functions of the Parliament, the continuation of this form of action is unlikely. On the other hand, the alteration of the uniform law now existing on many topics would manifestly be inconvenient, and it is accordingly agreed that there shall be consultation before changes are made in such legislation. On some topics, of course, divergence may be natural, but clearly it is necessary that on an issue such as prize law there must be a measure of agreement.

The power of the Imperial Parliament was formerly

Chapter XXI. exercised for a variety of reasons, some of which are now invalid. Thus (i.) constitutional Acts were usually first enacted by Parliament with power to the colonies to alter; legislation is still necessary for Canada, and may be used for the States of Australia. The succession and the royal style were formerly under Imperial control, the Statute of Westminster has provided that the constitutional practice requires concurrent action in the Dominions,<sup>1</sup> but the paramount power clearly remains, and is exhibited in the Statute of Westminster, 1931, as formerly in the Colonial Laws Validity Act, 1865. The Colonial Boundaries Act, 1895, gives power to alter, with the assent of the Dominions, their boundaries, a power still obviously necessary and valuable.

(ii.) Other Acts were justified by considerations of extra-territorial legislation or by international considerations. Such are the Fugitives Offenders Act, 1881, the Colonial Prisoners Removal Acts, 1869 and 1884, the Extradition Acts, 1870-1932, and the Colonial Courts of Admiralty Act, 1890. Even as matters stand, it will be most inconvenient if these matters are not regulated by accordant legislation.<sup>2</sup> Legislation for shipping and air navigation are now within Dominion authority.

(iii.) The Army and Air Force Acts and the Naval Discipline Act extend to the Empire and provide a code for British forces even when within Dominion jurisdiction. This position could clearly be altered by Dominion legislation, and it was therefore stressed at the Imperial Conferences of 1929 and 1930 that in any fresh legislation by the Dominions it must be secured that, when the armed forces of one part of the Empire were in the territory of another part with its assent, they should be exempted from local jurisdiction

<sup>1</sup> See pp. 106-11, *ante*.

<sup>2</sup> Both in Canada and the Union replacement of these Acts is contemplated.

on the same principle as is applied in foreign countries in like cases, e.g. an allied force on French territory.<sup>1</sup> Chapter XXI.  
The details of this principle have not yet been fully worked out, but in principle the issue is disposed of. The change in the position effected by the Statute of Westminster is marked by the fact that in 1922 it was found necessary to legislate so as to permit the application to members of the royal navy serving with Dominion forces of the Dominion legislation which otherwise would have been overridden by British law.

(iv.) In many international matters Imperial Acts were formerly passed where local legislation would have been even then adequate and now is normal. Such cases are the Foreign Enlistment Act, 1870, in part re-enacted in 1937 for Canada, the International Copyright Act, 1886, or the Geneva Convention Act, 1911, which interfered without consultation with trade-marks in the Dominions. The Convention of 1929, on the other hand, was dealt with by Dominion legislation. The Indemnity Act, 1920, on the other hand, was limited in its application to meet Dominion rights. But it dealt with the acts of Dominion forces in mandated areas before the mandates were granted and it barred actions in British courts for matters done in the Dominions even if they had not been made the object of indemnity there, thus preventing the enforcement in British courts of judgments obtained in the Dominions.

(v.) In certain domestic affairs of the Dominions, Imperial legislation intervened as a survival of the infancy of the colonies. Thus the Bankruptcy Act, 1914, and the Trustee Act, 1925, both contain rules binding property in the Dominions,<sup>2</sup> because the constitutional issue was not

<sup>1</sup> See pp. 91-3, *ante*.

<sup>2</sup> Dicey and Keith, *Conflict of Laws* (1932), pp. 367, 370 ff.

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raised when they were passed, while the Finance Act, 1894, was carefully worded to avoid laying direct burdens on colonial land in view of objections urged by the Agents-General and the High Commissioner for Canada. These provisions can now be dealt with by the Dominions as they please.

(vi.) The plan of legislation subject to adoption by the Dominions is exemplified in the Copyright Act, 1911, and the British Nationality and Status of Aliens Act, 1914. In both cases legislation concurrently<sup>1</sup> is expected to be adopted in future.

(vii.) Other Acts are simply concerned with matters affecting the United Kingdom, or part thereof, in relation to matters taking place in the Dominions. Thus Acts deal with reciprocity in recognition of medical or dental qualifications, the resealing of colonial probates, colonial solicitors, the avoidance of double income-tax, recognition of patents and trade-marks, and the very important question of the terms on which trustee rank can be accorded to Dominion and State loans. There are Acts also carrying out the British share of a bargain, as in the Act for the control of Nauru, or formerly the constitution and function of the Pacific Cable Board. Such Acts, of course, cannot be affected in any way by Dominion legislation, for the power of the Dominions does not extend to make laws for the United Kingdom.

(viii.) By other Acts, matters taking place in the Dominions are made criminal in the United Kingdom, and this state of affairs will not be affected by the Statute of Westminster. Under it (Section 2) the Dominions can prevent the Acts

<sup>1</sup> Thus in 1931 Canada amended her Copyright Act in order to enable her to adhere to the Rome Copyright Convention of 1928 and her Naturalisation Act to carry out the concession to married women agreed upon by the Imperial Conference of 1930. See Chapter VI.

operating so as to make the actions dealt with criminal in the Dominion or subject to punishment by the courts of the Dominion. But they cannot prevent the United Kingdom providing that certain persons shall, if found within British jurisdiction, be punished if they have committed certain offences abroad. Such crimes include those punished under admiralty jurisdiction, including crimes committed by any person on board British ships and crimes by British subjects on foreign ships to which they do not belong; treason committed abroad, as in *Casement's Case*,<sup>1</sup> murder and manslaughter; now regulated by the Act of 1861; offences against the Slave Trade Acts, if committed by any person in the British Dominions or by any British subject anywhere; offences against the Explosive Substances Act, 1883, that is offences by dynamiters, under the same conditions; perjury and forgery,<sup>2</sup> which are triable where the accused is in custody; bigamy contracted outside England or Ireland by a British subject,<sup>3</sup> and offences against the Official Secrets Acts, 1911–20, committed by any person in the British Dominions or by a British subject anywhere, or the Foreign Enlistment Act, 1870, committed by a British subject whether within or without the British dominions.<sup>4</sup> Moreover, where felonies have been committed in England or Ireland, accessories and abettors may be punished under an Act of 1861 in respect of acts done outside as well as within the British Dominions.

It is clear that a delicate situation arises from the position of the Dominions as autonomous units with their own nationals. Should the Imperial Acts continue to be valid in regard to such nationals, or should they be treated as being

<sup>1</sup> [1917] 1 K.B. 98, 133, *R. v. Lynch*, [1903] 1 K.B. 444.

<sup>2</sup> Perjury Act, 1911, s. 8, Forgery Act, 1913, s. 14.

<sup>3</sup> Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57.

<sup>4</sup> *R. v. Jameson*, [1896] 2 Q.B. 425.

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The ambit of Dominion legislation under the extra-territorial power conceded by Section 3 of the Statute of Westminster has been discussed above. It is clear that the Dominions can hardly claim power over all British subjects on the score of the common status demanded by the Imperial Conference of 1930.

(3) By an important innovation dating from 1920, effect has been given in matters judicial to the essential connection between the Dominions and the United Kingdom. For purposes of the conflict of laws or private international law the different parts of the Empire, so far as they have distinct legal systems, are treated as foreign countries as a matter of principle; Scotland thus being foreign to England.

<sup>1</sup> As British nationality is denied for subjects in the Irish Free State, it may be that a violation there of the Foreign Enlistment Act, 1870, could not be punished in England.

But it has long been possible to obtain in England<sup>1</sup> the execution of Scottish judgments by a simple process in lieu of the necessity of bringing a formal action in the English courts on the Scottish judgment, and *vice versa*. Not until the Administration of Justice Act, 1920, was this procedure made applicable to the Dominions, including the Australian States and the Canadian provinces, on condition of reciprocity. The system provides for the registration, in a Superior Court of the United Kingdom, of a judgment ordering payment of a sum of money obtained in a similar court of any Dominion, whereupon execution can be carried out as if the judgment were one of the court by which it is registered. Moreover, the conditions of registration are eminently reasonable. It is necessary that the person against whom judgment is given shall either have consented to accept the jurisdiction of the Dominion court, or have ordinarily resided or carried on business within its area; he must have been duly served with process, and the judgment must not have been obtained by fraud, nor must it be the subject or intended subject of appeal to a higher court in the Dominion. The Act can be applied only by Order in Council where reciprocity is offered, and it has been widely applied except in Canada, where the majority of the provinces exercise jurisdiction rather too widely for it to be easy to apply the principle to their judgments.<sup>2</sup>

There is also provision for the recognition, in the United Kingdom, of probates of wills and letters of administration of the estates of intestates granted in the Dominions,

<sup>1</sup> In certain cases English and Scottish process can still be executed in Ireland, cf. *The State (Dowling) v. Brennan*, [1937] I.R. 483.

<sup>2</sup> Dicey and Keith, *Conflict of Laws* (1932), pp. 480-83. The Irish Free State so far stands outside the system. The Foreign Judgments (Reciprocal Enforcement) Act, 1933, is applicable to the Dominions in lieu of the Act of 1920, if desired. See *Yukon Corp. v. Clark* (1938), 54 T.L.R. 369.

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States, and provinces, again on the basis of reciprocity, thus saving much expense and facilitating dealings with property of persons dying outside the United Kingdom.<sup>1</sup> Moreover, bankruptcy courts throughout the Empire act as ancillary to one another,<sup>2</sup> even as regards the Irish Free State.

On the other hand, the equality of the Dominions was long since recognised by the withdrawal in 1862 of the power of the English courts to issue writs of habeas corpus effective throughout the colonies,<sup>3</sup> though the writ runs still to the Channel Islands, which for most purposes are without the sphere of the operation of British legislation and jurisdiction.

(4) Of great importance materially, economic co-operation is constitutionally a matter of little complication. The essential character of the co-operation has in the past consisted of the establishment of instrumentalities for the purpose of promoting Empire trade, and of the conclusion of agreements between parts of the Empire for preference in trade. There was at first some hesitation on the part of Canada as to accepting any form of organised co-operation even in the sphere of economics, lest it should have political implications, and therefore it was not until 1925 that the Imperial Economic Committee, which was recommended by the Imperial Economic Conference of 1923, came into being. Its competence was enlarged by the Conferences of 1926 and 1930,<sup>4</sup> and now it extends to the investigation of all kinds of matters bearing on Empire marketing; the facili-

<sup>1</sup> Dicey and Keith, *op. cit.* pp. 389, 390, 527, 528.

<sup>2</sup> *Ibid.* pp. 370, 497 ff., 508 f.

<sup>3</sup> The act was passed because in *Anderson, Ex parte* (1861), 3 E. & E. 487, a writ had to be issued to Canada. It no longer lies to the Free State Secretary of State v. *O'Brien*, [1923] A.C. 603.

<sup>4</sup> The Imperial Conference of 1937 agreed that Burma be invited to be represented, to share the increased cost of £22,000 a year up to March 31, 1943.

tating of conferences among those engaged in particular industries in various parts of the Empire; and the carrying out of any investigation which the Governments may decide to entrust to it. The composition of the Committee is representative on a footing of equality of the United Kingdom, the Dominions, including Newfoundland, India, with representatives for the Crown Colonies and Protectorates, and for Southern Rhodesia. Its many reports have been of considerable advantage in disseminating information. More immediately practical has been the work of the Empire Marketing Board, which was set up in 1926 by the British Government under the Secretary of State for the Dominions to promote the marketing of Empire produce, and the development of inter-Imperial trade by use of the sums—initially £1,000,000 a year was projected—to be granted by Parliament for this end. This procedure was due to the decision of the Government that, as the policy of imposing a tariff with Dominion preferences had been rejected in 1923 by the electorate, it would be possible in this manner indirectly to accomplish much of what it had been its desire to do more directly. At the Imperial Conference of 1930 it was realised that the Board should be allowed to extend its work to endeavouring to promote the sale of British produce in the Dominions. In view of the great services rendered by the Board in promoting the sale of Union products in the United Kingdom, it is not surprising that considerable annoyance was expressed by the Opposition in the Union Parliament on March 11, 1932, when it transpired that the responsible minister declined official patronage to a "Buy Empire Goods" campaign in the Union. Similarly, it proved impossible at the Ottawa Conference in August to secure any contribution from the Dominions towards the cost of the Board, the British

Chapter XXI. Government consenting to continue its expenditure for a further year, although it was admitted by the Dominions that, with the adoption of preferential trade in favour of them, the motive for the maintenance of the Board on the original basis had disappeared. The Board thus ended on October 1, 1933.<sup>1</sup>

Of earlier date is the Imperial Shipping Committee, which was established in 1920 under a resolution of the Imperial War Conference of 1918. Under the resolution of the Conference of 1930 its functions were, (1) to enquire into complaints into ocean freights, facilities, and conditions in the inter-Imperial trade of questions of a similar nature referred to them by any of the nominating authorities, and to report their conclusions to the Governments concerned, and (2) to survey the facilities for maritime transport on routes necessary for inter-Imperial trade, and to make recommendations to the appropriate authorities as regards facilities, type of ships, depth of water in docks and channels, and harbour construction, with due regard to the possibility of air routes. The constitution of the Committee is of fifteen members, nine nominated by the Governments concerned, five representing shipping and commerce, and one civil aviation, with an independent chairman. It has reported on many important issues.

As regard telegraphic communications, the Imperial Wireless and Cable Conference of 1928 recommended the setting up of a Committee which was duly constituted in 1929 as the Imperial Communications Advisory Committee. It consists of eight members, representing the United Kingdom, the five great Dominions, India, and the colonies and Protectorates. It is charged with certain responsibilities affecting the work of the Imperial and International Com-

<sup>1</sup> It is arranged to revive it for the Colonial Empire only (June 1937)

munications, Ltd., the public utilities company set up by advice of the Conference to co-ordinate inter-Imperial telegraphic services. The Committee deals in special with questions of principle such as the institution of new services, the discontinuance of old services, alterations of rates, and the distribution of business among the different routes.

A much more ambitious project was the cause of the establishment of the Oversea Settlement Department and of the Committee of the Dominions Office in 1922, as a result of the recommendations of the Dominions Royal Commission and the Empire Settlement Committee followed by the passage of the Empire Settlement Act, 1922. It was then proposed to further the settlement of emigrants from the United Kingdom overseas on a large scale on the basis of the division of cost between the British and the Dominion Governments. The justification for British expenditure up to £3,000,000 a year was the view that it was advantageous to be able to provide a satisfactory outlet for surplus population, and that Imperial interests demanded the increase of the population in the Dominions, which should involve in due course an increase of inter-Imperial trade. The most important outcome of the proposal was the conclusion of an agreement in 1925 with the Commonwealth, and through the Commonwealth the States, for the settlement of emigrants in Australia, the consideration being loans up to £34,000,000 at a low rate of interest as well as a share in the cost of transport.<sup>1</sup> Unfortunately it has proved impossible for the settlers to be given the treatment which was expected, as was shown by the complaints of settlers in Victoria, investigated by a local Royal Commission, and in

<sup>1</sup> *Official Year Book of the Commonwealth*, xxii 929, xxiv 677 For the grudging settlement of 1934, see p 446, *ante* Arbitration between the Commonwealth and Victoria settled the issue of responsibility to pay.

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<sup>1</sup> Parl. Pap Cmd 4075, a very inconclusive report; for 1934-6, Cmd. 5200, 5314 In 1937 the Act was renewed with the grant halved Nothing could be done for emigration at the Imperial Conference, and the Canadian Minister responsible, Mr. Crerar, informed a strong deputation that the Government could do nothing (June 14, 1937).

In 1932, however, the Dominions Secretary insisted that the British Government could not agree to bear the cost of repatriating from Australia those emigrants who had found the promises made to them on behalf of Australia dis-honoured in practice. The decision was no doubt unavoidable, but unquestionably those emigrants who were assisted to the Commonwealth under the agreement have a moral right to expect the British Government to secure that the Commonwealth honours as regards emigrants already in the territory the assurances given to them, even if performance of the obligation to take further emigrants is waived on the plea of the poverty of the Dominion.

Of the issues raised at the Imperial Conference of 1937 the most useful affected air communications, whose expansion has been enormously furthered by the bold plans of the British Postmaster-General in arranging for air communications which will revolutionise communications by post throughout the Empire, and should greatly increase the possibility of full understanding between the peoples of the Commonwealth, if due advantage is taken by the press of the great opportunities afforded. There was also impressed<sup>1</sup> on the Conference the vital importance of aiding the dissemination of news by British agencies in view of the danger of such spreading of information falling into the hands of agencies under foreign control and in receipt of generous subsidies, based on a shrewd appreciation of the value of information for propaganda purposes. Contemporaneously, the unwisdom of leaving the British people in ignorance of Italian and other foreign propaganda intended to endanger the position of Britain internationally was stressed.

<sup>1</sup> The Empire Press Union Conference had simultaneously discussed the issues.

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Another issue vitally affecting Australia and New Zealand was that of the menace to their shipping by the competition in the trade between the Dominions of shipping heavily subsidised by the United States, in particular the Matson line, while the trade between Hawaii and the United States was closed to British shipping. The issue formed the subject of agreement between the two Dominions in September 1934, but not until 1936 did New Zealand legislate to take power to exclude foreign shipping from the trade with Australia,<sup>1</sup> and in 1937 the Commonwealth contemplated like legislation.<sup>2</sup> It was stressed by both Governments that the aim was to secure an agreement with the United States on an amicable basis. The Minister of Marine expressed an ardent desire for a peace pact in the Pacific involving the three Dominions, Britain, China, Japan, the United States, France, and Holland, and at least for accords as to shipping and air traffic. It was pointed out that, without Australian aid and British concurrence, little could be done, and naturally the matter was strongly stressed at the Conference of 1937, but without decisive results. Though the matter was specially discussed by representatives of the United Kingdom, Canada, Australia, and New Zealand, no accord could be achieved and the matter had—as was expected—to stand over for further consideration.<sup>3</sup> Note was also taken of the investigations being carried out by the Imperial Shipping Committee<sup>4</sup> into the position of British shipping in Middle and Far Eastern waters, and arrangements agreed upon to secure additional statistics of imports and exports for guidance.

<sup>1</sup> *J.P.E.*, 1937, pp. 151-9

<sup>2</sup> *Ibid.* pp. 369, 370, 598.

<sup>3</sup> New Zealand hopes like British Columbia that a subsidy may be given.

<sup>4</sup> Its work received deserved commendation, and it was made clear that a representative of Burma would be welcomed. The cost was fixed at £2000 a year up to March 31, 1943. See *Parl. Pap. Cmd. 5482*, pp. 30-32.

The importance of polar issues resulted in inviting the attention of the Australian, New Zealand, and Union Governments to the advantages of establishing one or two permanent meteorological stations in the Antarctic for the accurate recording of daily climatic conditions. It is hoped also to interest the Dominions in the work of the Discovery Committee and the investigations into conditions in the Antarctic carried out by *Discovery II*.<sup>1</sup>

The air service issue is of special international importance, for a service across the Pacific necessarily means co-operation by the United States in the same way as an American service across the Atlantic requires facilities under British control. The Conference recognised that when one member receives an application for air facilities which is likely to affect another member there should be consultation between the Governments concerned before facilities are granted. If an agreement has been reached as to the return facilities which should be required, the member applied to will use its best efforts to obtain the reciprocal facilities required. The agreement, of course, means that, from motives of Imperial solidarity, the Commonwealth should treat itself as a unit for giving and obtaining facilities. Naturally the Conference approved the practice that, where operational rights are granted to a foreign air line, the concession expressly provides for reciprocal rights being accorded as and when desired, and made the suggestion that in such concessions the Government should safeguard its right to take over the ground organisation within its territory on suitable terms. The Conference recognized also that in some cases it might be proper that a Government should secure, by agreement with other Governments of the Commonwealth, control, not only over services operating in

<sup>1</sup> Parl. Pap. Cmd. 5482, pp. 34, 35.

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On the other hand, a negative result was achieved on the Australian suggestion of an Empire Agricultural Council. The view was held that some of the work could be done by the Imperial Economic Committee, while *ad hoc* bodies were more suitable for consideration of questions which could not be met by the existing agencies. The decision is interesting as one more affirmation of the principle of avoiding any permanent organisation which might infringe the principle of Dominion autonomy.<sup>2</sup>

(5) A start with the doctrine of preference in inter-Imperial trade was made by Canada in 1897 when Sir W. Laurier conceded preference without exacting any return from the United Kingdom.<sup>3</sup> His motive was partly sentimental—ennobled by R. Kipling—to mark Canada's appreciation of the Imperial connection on Queen Victoria's Diamond Jubilee, partly economic. To gain low freights for Canada's exports it was expedient that the ships conveying them should have full cargoes to bring to the Dominion. Moreover, Canada resented the raising of the United States tariffs against her in the Dingley tariff in that year. In return the British Government denounced the treaties with the Belgian Government and the German Zollverein of 1862

<sup>1</sup> Parl. Pap. Cmd. pp. 28, 29.

<sup>2</sup> *Ibid.* pp. 33, 34. The Australian proposal envisaged the holding at more frequent intervals than those of Conferences meetings of Dominion Ministers of Agriculture, the High Commissioners on occasion acting in lieu. It is patent that this matter was really largely one for the Governments of the Canadian provinces and the Australian States, and it might well have been rejected as unconstitutional unless made with their concurrence. In any case such a matter would best have been handled outside the Imperial Conference.

<sup>3</sup> Willison, *Sir Wilfrid Laurier*, II. 286-312, Skelton, *Sir Wilfrid Laurier*, II. 54 ff.

and 1865, under which the Canadian preference had had to be extended to every country between which and the United Kingdom there existed a treaty containing a most-favoured-nation treatment clause. In 1902, in 1907, in 1911, the Dominions announced their desire for Imperial preference, but it was not until the war that the British Government accepted the principle, approved it in 1917, and carried it into effect in 1919. The preferential duties were, however, then limited in extent owing to the objection to taxing either food or raw materials, and the Conference of 1923 recommended further measures which were defeated, for the electorate rejected the appeal of Mr. Baldwin to give his Government authority to protect British industry and to give preference. Not until the National Government was formed in 1931 was this policy completely reversed.

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The other Dominions have gradually followed the lead of Canada. The South African Customs Union of 1903 adopted the plan of Imperial preference; New Zealand also gave a British preference, and in 1907 made an agreement with the South African Customs Union. In 1908 Australia gave preference. But it was not until 1922 that Australia and New Zealand could agree on a preferential treatment of their mutual trade, and, when in 1925 Canada and Australia came to terms, much irritation was caused in the Dominion. New Zealand was granted by Order in Council the advantages given to the Commonwealth, and reciprocated by acceding the British preferential tariff. In 1930, however, the necessity of meeting the demands of Canadian butter producers who objected to the entry of New Zealand butter resulted in the imposition of prohibitive rates in the Dominion.<sup>1</sup> New Zealand in 1930–31 withdrew the British

<sup>1</sup> *Canadian Annual Review*, 1930–31, pp. 516 f. Canadian industrial development proceeded very rapidly during and after the war, American manufacturers

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rates, with the result that Canadian motor cars and other exports were virtually excluded. The result was a new agreement in 1932 which agrees in considerable measure with an agreement of 1931 between Canada and Australia—modified in 1934 and 1936—replacing the arrangement of 1925. In both these agreements Canada grants and receives as a rule the British preferential rates, but on a few articles there are concessions bringing the duties below these rates. The Australian agreement, however, provides for the right of either party to call the attention of the other to any case in which exports from the other are causing prejudice to the sale of domestic products or manufactures of the same kind. If the other party does not remedy the matter within three months, then the provisions of the general tariff apply to the articles indicated. This prevents it being necessary to terminate the agreement as a whole. In the case of New Zealand the provision is similar, but the mode of action is by applying the anti-dumping legislation of either country and the period is only thirty days, and the Dominion Government may insist that imports other than perishable goods may be placed in bond during that period. The New Zealand agreement also allows of either party increasing rates on the articles included in the agreement on three months' notice, but not so that they exceed whatever is the British preferential rate. The agreements are of short duration, illustrating the great difficulty felt even with so much elasticity in adjusting terms which are not regarded as too risky to be made abiding.

In these cases, it will be seen, the ruling principle is that

transferring their businesses in part to Canada to avoid Canadian duties and secure Imperial preferences. In 1932 American capital was estimated at £1,700,000,000 as against £424,000,000 British, a fact explaining opposition to British trade.

the British preference may be lowered as between the Dominions. But in the case of the Union in 1925 the principle was adopted that tariffs ought to be reciprocal simply, and the grant to foreign States of better terms than to the United Kingdom was even contemplated, but had to be abandoned in view of the protests made by the Opposition. In 1928, however, Germany was promised the advantage of any further preferences given to the United Kingdom or a Dominion, and the preferential system was drastically revised to reduce what South Africa thought she gave to what she thought she might receive. The result of the policy of 1925 was the termination of the agreement which had so long existed—from 1906—with Australia. It must, however, be added that the German treaty included provision for easy determination, and the Government maintained its readiness to terminate the arrangement if it could receive better terms from the United Kingdom.

Between Australia and New Zealand it was found extremely difficult to secure satisfactory terms. The agreement of 1922 was replaced by a new one in 1926, and in 1928 New Zealand had to agree to the drastic increase in the imposts on her exports of butter and cheese.<sup>1</sup> Australia also in the financial and economic crisis in 1930–32 found it necessary by a series of measures to exclude as far as practicable all British or foreign exports with which Australian consumers and manufacturers could dispense. But, as was pointed out, even in the earlier period Australia, in common with the other Dominions, had built up tariff barriers on such a scale that there was no real possibility of competition with industries protected in the Dominions for British exports. The fact was brought out with great clear-

<sup>1</sup> Continuous difficulties between the Dominions occurred in 1934–5, a new agreement having been made in 1933.

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ness by Mr. Baldwin at the Ottawa Conference of 1932 when he stressed the size of the balance of trade in favour of the Dominions, and pointed out that for all practical purposes British exports found no free entry into the Dominions, while Dominion exports in overwhelming quantities were free of entry into the United Kingdom. He also stressed the error of thinking that large preferences over foreign competition had any real value for the United Kingdom, if the rates still levied on British imports were on a scale which rendered competition with local manufacturers impracticable. Moreover, it was pointed out that the Canadian practice, followed also in the other Dominions, of abruptly imposing anti-dumping duties was destructive of all security in trade and prevented British exporters making effective contracts in advance. On the other hand, stress was laid on the determination of the Dominions to erect a better balanced structure of economy than could exist on the basis of devotion to agriculture alone. This doctrine is one which has been incessantly enunciated by the Irish Free State, which has aimed at fostering new industries, at first welcoming the investment of non-Irish capital, but in 1932 altering its policy so as to penalise such capital and to restrict its support to purely Irish undertakings. As it was at the same time admitted by Mr. De Valera that it was probably impossible to find foreign markets for the products of Irish farming, the prospect for that industry appears to be somewhat depressing; a small country with industries and agriculture confined to the local market is hardly destined to enjoy even a modest prosperity.

In the circumstances it was not to be expected that agreement at Ottawa would be easy, for the Dominions failed to realise that their offers to the United Kingdom were largely illusory, and were strengthened in their resist-

ance to pressure by the belief, fostered by the continuance of the grant to their exports of freedom from duties despite the imposition of tariffs generally, that the British market would, for domestic reasons, remain open to them without serious counter concessions. Moreover, Russian dumping was bitterly resented by Canada, which desired the British Government to assimilate its attitude to that of Canada and to refuse entry to goods produced under unfair conditions of competition. In the end, pressure of the desire to be able to assert success in the negotiations led, on August 20, 1932, save in the case of the Irish Free State, to agreements, largely in favour of the Dominions at the expense of the United Kingdom, and to a certain amount of inter-Dominion concessions. It must, however, be admitted that in the framing of the compact with Canada so much friction was engendered that it illustrates the grave dangers of seeking to base inter-Imperial co-operation on trade considerations. The Dominions have found among themselves that trade is apt to lead to tension of relations when in lieu of voluntary preferences a balance of advantage falls to be struck between the parties.

The Ottawa agreements, as far as concerns the Dominions, rested on the basis that they would maintain existing British preferences, and would also consider seriously the reduction of their tariffs so as to secure British manufactures the possibility of competition on reasonable terms. Access to the Tariff Boards of Canada and Australia was to be accorded to British manufacturers, though the value of this concession is problematic, and proved minimal, especially in Canada, where the object of creating the Board was to secure fuller protection for home industry. In any case the Dominions will protect such local undertakings as they think capable of successful development as opposed to

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Constitutionally the agreements were open to no serious objection on the score of duration, for that is limited to five years with possibility of denunciation by six months' notice before that date, and on like notice thereafter. The only exception was the British undertaking to ask Parliament for a ten-years' preference on tobacco, which is a luxury and may be treated differentially. This obviated any serious criticism of the compacts as unduly tying the hands of Parliament,<sup>1</sup> a possibility protested against in advance by Mr. Mackenzie King.

It is important to note that Newfoundland was brought definitely into the ambit of the British preferential scheme as well as Southern Rhodesia, which had always had close relations with the United Kingdom, first as part of the Customs Union, and then as a self-governing colony. The

<sup>1</sup> Cf. Keith, *Letters on Imperial Relations, 1916-1935*, pp. 112-15.

agreements were also made in some measure applicable to the colonies and protectorates, thus bringing them into close contact with the Dominions as parts of the Empire, if not of the British Commonwealth of Nations.

Inter-Dominion preferences proved more difficult of attainment. But the Union made compacts with Canada, New Zealand, and the Irish Free State;<sup>1</sup> Canada with the latter and Southern Rhodesia. Despite the difficulty caused by the British decision that negotiation with the Free State was impossible pending the settlement of the outstanding difficulties between the countries over the breach of the Irish treaty, the Free State delegates were able to accomplish something and to establish friendly relations with the personnel of the other delegations. Clearly, however, the nature of the exports of the State forbids much hope of a substantial development of inter-Imperial trade save with the United Kingdom.

Valuable as were the results in the economic sphere, the political implications were of far greater importance. As already mentioned, the Conference had to face the issue of the relations of inter-Imperial preferences to the most-favoured-nation clauses of treaties with foreign powers. It was resolved that these preferences must be maintained apart from treaty relations, which meant essentially that the Conference had homologated and reaffirmed the doctrine of the Conference of 1926 that relations between the Dominions are not regulated by international law. If, of course, they were so regulated, it would clearly be impracticable for the system to work, as the advantages conceded between the parts of the Empire would enure to foreign powers, unless and until all treaties with most-

<sup>1</sup> In 1935 most-favoured-foreign-nation treatment of imports was arranged with the United Kingdom, Canada, Australia, and the Irish Free State.

favoured-nation clauses were abrogated, a step of dubious value to British foreign trade and relations. This is a most important result, for it means that the need of economic unity has interposed a most substantial barrier in the way of the development of the tendency to stress the sovereignty and independence of each unit of the Empire. Incidentally it afforded a strong support to the British contention that its differences with the Irish Free State ought to be decided by a domestic tribunal and not by one on which sat a foreign arbitrator.

A further most important agreement pledged the United Kingdom and Canada to the effect that, if either Government was satisfied that the system of preference in respect of any class of commodities was being frustrated through the State action of any foreign country, it would use its powers of prohibition of import to secure the effective operation of the preferences which it had granted. This clause, of course, was directed essentially against Russian dumping of wheat, and especially timber under the Five-Year Plan, but specific mention was deliberately avoided. The principle was of importance, for it met the contention of the Dominion that no preference would avail to aid timber against dumping, and the same plea had been adduced by the Scandinavian countries, the other great historic source of British timber imports. In this point as in general the agreements were intended not to prevent other forms of Empire trade being developed, though its immediate object was to encourage fuller use of the opportunities of exchange of Empire commodities on reasonable terms.

The actual operation of the Ottawa agreements does not form a happy episode in the history of Imperial relations. It is quite unnecessary to accuse Mr. Bennett of bad faith, though it was of a project of his that the Dominions

Secretary used the term "humbug"; but he and his associates were so convinced of the necessity of protecting Canadian industry that every obstacle was interposed in the way of reduction of the barriers which shut out British goods. Thus, while tardily there was passed an Act to take away the power of the Minister of National Revenue to fix the value for duty purposes of goods from Great Britain, when the Tariff Board ruled that orders earlier made by the minister had ceased to have effect, the Government secured the reversal of that ruling from the Supreme Court, which meant that unfair discrimination continued to be practised.<sup>1</sup> It is significant that Mr. Mackenzie King, in January 1935,<sup>2</sup> denounced the policy of keeping British goods out of Canada, and of hampering by the unwise terms of the accord the possibility of development of trade with the United States, while British exporters complained with justice that no serious progress was being made with the duty imposed on Canada by the agreement of permitting British goods to compete on reasonable terms with Canadian manufactures. Mr. Bennett's policy at last involved him in domestic difficulties, for the unfair exactions made on consumers led to investigations by a Price Spreads and Mass Buying Commission, which proved so serious that, as the Prime Minister could not give way, the Minister of Commerce, Mr. Stevens, resigned in 1934, and the discredited and enfeebled ministry, after a reckless effort to destroy the balance of the constitution by invoking the treaty power described above, went down to a deserved disaster in the election of October 1935, when it lost 91 seats and was reduced to the miserable total of 41, and the Liberal party with 169 votes took charge. The result was the liberalisation of trade policy, and a thorough overhaul

<sup>1</sup> *J.P.E.*, 1934, pp. 603, 604.

<sup>2</sup> *J.P.E.*, 1935, pp. 298, 299.

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XXI. in 1937<sup>1</sup> of the agreement of 1932 calculated essentially to improve the possibilities of world trade. There was no increase of rates to allow of preferences, but as much elasticity as possible, and lowering of rates as well as the removal from certain classes of imports of dumping duty, thus removing the just grievance of British exporters that, while Canada was permitted to dump goods on Britain, any such action by Britain was at once penalised. The whole aim of the accord was to permit, on both sides, of encouragement to world trade, and in the same spirit a wide reciprocity treaty was made with the United States and the tariff war with the U.S.S.R. was brought to a stop.

In the case of Australia likewise there was a marked contrast between the complete and full carrying out of the agreement by Britain and the reluctant effect given to it by Australia. The responsibility there rested rather with the Parliament than the Government, which seems to have endeavoured to keep faith. The unsatisfactory character of the position was manifested in the attitude of Parliament on the issue of the reductions urged by the Tariff Board in the rates against British imports. In the case of cement<sup>2</sup> the Board stated in plain language that the manufacturers were making excessive profits and were abusing their monopoly. None the less the reduction was bitterly opposed not only by the Labour party, which had done its best to shut out all imports of manufactures while dumping Australian produce wholesale on Britain, but also by supporters of the Government, and, though the Senate was induced to protest against this flagrant breach of faith, the removal

<sup>1</sup> *J.P.E.*, 1937, pp. 345 ff.; Parl. Pap. Cmd. 5382 (Feb. 23, 1937). For the United States treaty (Nov. 15, 1935), Cmd. 5597, see *J.P.E.*, 1936, pp. 277 ff., 498 ff.

<sup>2</sup> *J.P.E.*, 1936, pp. 552 ff.

of duty was postponed until December 1, 1936, with complete disregard for the fact that an agreement religiously observed by Britain had been deliberately broken. What was worse, the opinion of counsel was seriously adduced to show that there was no breach of contract because the Government had only undertaken to recommend action by Parliament, and, if Parliament would not act, it was free to drop the matter. Fortunately Mr. Eggleston<sup>1</sup> protested firmly against this wholly worthless contention. The result unquestionably is to show that agreements with the Dominions are one-sided. They are kept loyally and in the spirit by Britain, while even in the letter they are violated by the Dominions. In the case of New Zealand there was rather less friction because little had been promised, but some difficulty was caused by the currency policy of the administration, which on one view might be deemed to operate adversely to British trade. The Labour Government in 1936-7 adopted the policy of seeking a wide measure of exchange between the two countries, being anxious that Britain should present an unlimited market to the expansion of New Zealand exports; but it naturally proved that this policy was incompatible with the necessities of the British position, which involved the maintenance of some sort of equilibrium in the imports received from the Dominions and foreign countries with which Britain had important ties of trade.

It is decidedly significant of the difficulties of inter-Imperial trade that, at the Conference of 1937, discussion of revision of the Ottawa Agreement was not desired by Australia, or by Canada which had already arranged modification, while it was pressed by New Zealand, whose Minister of Marketing had made a preliminary visit in order

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<sup>1</sup> *Austr. Law Journal*, x. 70 ff., citing *The Blonde*, [1922] 1 A.C. 313.

Chapter XXI. to prepare the way for a settlement by the Prime Minister with the British Government. The legislation necessary to give effect to the agreement with Canada was opposed in the Commons<sup>1</sup> as inconsistent with the efforts being made to secure an agreement with the United States, and a strong plea was put forward for the taking of a wider view of the necessity of expanding world trade, on the score that by expansion and by increase of trade in general the Dominions in the long run would be the gainers. At the same time, advantage was taken of the Imperial Conference to seek statements from the Dominions as to what sacrifices or concessions—if any—they would offer in order to enable a trade agreement to be concluded with the United States. Stress was naturally laid on Mr. Cordell Hull's repeated assertions of the great importance attached by the United States to the conclusion of an accord for freer trade with the United States, and of the patent fact that, if the Ottawa system were maintained intact with full continuance of the privileges granted to the Dominions, it would prove impossible to make any concessions to the United States worthy of reciprocal action on her part. The response of Dominion opinion was far from cordial, though Australia had already shown that foreign trade was essential in her accord with Japan, and Canada had similarly acted in her accord with the United States. The proceedings at the Conference in fact demonstrated once more how vain are the amiable aspirations of enlightened economists in the United Kingdom, who in their eloquent appeals<sup>2</sup> to the

<sup>1</sup> June 9, 1937.

<sup>2</sup> See, e.g., H. V. Hodson in *The Empire in the World* (1937), a work marked by much idealism, but marred by the complete inability of its journalist authors to understand the strength of national feeling whether in the political or the economic sphere. This was, of course, the fundamental defect of the round table movement in its long struggle for Imperial Federation, and it has survived

British Government to give a lead to the Dominions in a movement for the lowering of tariff barriers, and the relaxation of the impediments to trade caused by quotas, exchange restrictions, frozen credits, and so forth, utterly ignore the strength of economic nationalism, and the fact that every Dominion Government has to base its proposals in full consciousness of the existence in the Dominion of a very strong body of opinion among manufacturers and industrial workers alike, who are united in the demand that the home market must be reserved in ever-increasing degree for them to exploit, indifferent to the undue sacrifice thus demanded from primary producers whose oversea markets are naturally limited by the diminution of the flow of trade between the countries, while the necessity of buying their essential manufactured goods in a very highly protected market adds gravely to their economic plight.

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These considerations explain the jejune treatment of the issues by the Imperial Conference. The subject of the Ottawa agreements was so resolutely tabooed as to appear rather absurd, but there was at least verbal recognition that in the last resort the prosperity of the countries of the Commonwealth depends on that of the world as a whole, and that a healthy growth of international trade, accompanied by an improvement in the general standard of living, was an essential step to political appeasement, or, as Mr. Chamberlain put it<sup>1</sup> more effectively, "a selfish and exclusive nationalism forms no part of our common creed". Nothing, however, practical was, or no doubt could be, done at the

the abandonment of that ideal. The Australian Government in Dec. 1937 had to start energetic propaganda to secure support for revision in 1938 of the Ottawa agreement to allow of the conclusion of the British-United States trade agreement, including Prof. Copland's appeal (Jan. 12, 1938). For New Zealand's trade accord with Germany, see p. 586, *ante*.

<sup>1</sup> Parl. Pap. Cmd 5482, p. 63.

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Conference to show readiness to convert theory into action. Sympathy was expressed with the declaration of September 1936 by the British, French, and United States Governments in connection with the devaluation of the franc, and their insistence on the necessity of progressive relaxation of the system of exchange controls and quotas; with the informal investigations undertaken in this sphere by M. van Zeeland at the instance of Britain and France, and with the action in this sense of the United States. But the value of mere sympathy in the present condition of the world is negligible.

(6) The relations between the Dominions and India stand on a distinct footing from their relations *inter se*. This depends essentially on the fact that, while there is normally freedom of intercourse between the Dominions, though each exercises the widest power of exclusion of other British subjects at its discretion, the Dominions definitely have closed their doors to the immigration of Indians. The principle of such exclusion has been recognised by India on the score of the right of each part of the Empire to regulate the composition of its own population, and to follow such a policy as may best accord with its own views of the wisest method in which to build up its social and economic structure. The principle of inter-Imperial equality, however, has one satisfactory effect. It has induced the Dominions to recognise that they may be subjected at pleasure by the Indian Government to similar conditions of exclusion to those which they impose. This principle, enunciated at the Imperial Conference of 1917, was reinforced by the Conference of 1918 with the recognition that it was proper that Indians lawfully domiciled in the Dominions should be permitted to bring into them their wives and minor children, assuming that such marriages were *de facto*

monogamous. This was followed in 1921 by the further recognition that in principle Indians lawfully resident should not be denied the ordinary right of citizenship. From this view South Africa expressed strong dissent, and the contest was renewed in 1923 when General Smuts recorded his disapproval of the formation of any resolutions by the Conference when unanimity could not be achieved, and when, on the contrary, the Indian delegates pressed for reconsideration of the whole issue by the Union and for direct negotiations with the stationing of an agent of the India Government in the Union to represent Indians there resident, and to act as an intermediary between them and the Union Government.

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The proposal, in its recognition of the right of the Government of India to interest itself in Indians domiciled abroad, was repulsed by General Smuts, who insisted that there could be no question of extending political rights to Indians, and that for economic reasons the Union must safeguard herself against their competition. General Smuts' position was difficult. The laws of the Transvaal forbidding acquisition of landed property by Indians had been circumvented in various ways, and the activity of the Indians in petty trade was an object of envy to their competitors, often themselves immigrants, or descendants of immigrants of foreign origin,<sup>1</sup> into the Union. The Asiatic Inquiry Commission of 1920-21 presented recommendations which were carried out in part by the Government, resulting in the further lowering of Indian status in the Union; and the feeling there against Indians was so marked that the ministry, after the Conference of 1923, proceeded to intro-

<sup>1</sup> It is to be noted that in 1937 it was found necessary to restrict Jewish immigration as bringing many undesirables into the country; *J.P.E.*, 1937, pp 405 ff.

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Under this agreement both Governments reaffirmed their recognition of the right of the Union to use all just and legitimate means for the maintenance of Western standards of life. The Union Government recognised that Indians domiciled in the Union who were prepared to conform to Western standards of life should be enabled so to do. For those Indians in the Union who might desire to avail themselves of it, the Union Government would organise a scheme of assisted emigration to India or other countries, where Western standards were not required. Union domicile would be lost after three years' continuous absence from the Union, in agreement with the revision it was proposed to make of the general law relating to domicile, emigrants under the assisted emigration scheme who desired to return to the Union within the period of three years would be allowed to do so only on refunding the cost of the assistance given. The Government of India recognised its obligation to look after such emigrants on arrival in India. The admission into the Union of the wives and minor children of Indians permanently domiciled in the Union would be regulated by the terms of the Imperial Conference Resolu-

tion of 1918. In the expectation that the difficulties with which the Union had been confronted would be materially lessened by the agreement, and to secure that the agreement should come into operation under the most favourable auspices, the Union Government agreed not to proceed further with the Areas Bill. Provision was made for the stationing in the Union of an agent of the Indian Government in order to secure continuous and effective co-operation between the two Governments, and Mr. Srinivasa Sastri, who had long been a protagonist in expressing Indian views, was selected as the first incumbent of the office.

Successful in its own way as this agreement was, it did not prevent difficulties arising. It was the hope of a considerable section of the Dutch population that the agreement meant the deportation of a large number of Indians; but this expectation was not fulfilled, and, on the other hand, the land difficulty in the Transvaal revived. In 1919 an Act<sup>1</sup> had been passed to prevent companies controlled by Indians from holding land, and thus evading the Gold Law of 1908 which forbade Asiatics doing so; but in a number of cases this prohibition had been evaded, without breach of the letter of the law but in defiance of its spirit. It was proposed, therefore, by the Government of the Union to legislate by the Transvaal Asiatic Tenure (Amendment) Bill to meet these evasions, and to diminish substantially the future possibility of Asiatics holding land or trading in the province. As a result of this and other difficulties a further Conference met in January and February 1932 and achieved agreement. It was recognised that, as 80 per cent of the Indians in the Union were Union born,<sup>2</sup> it was hope-

<sup>1</sup> Keith, *War Government of the British Dominions*, pp. 319-21.

<sup>2</sup> The Indians (165,731 in 1921) are found chiefly in Natal (183,441), Transvaal (26,032), Cape (10,862), the Orange Free State (44 only in 1936, 395 in

**Chapter XXI.** less to contemplate their settlement in India, and the two Governments therefore agreed to co-operate in seeking to secure settlement elsewhere, a representative of the Indians in the Union assisting them if so desired by the community. But, as was to be expected, nothing whatever came of the enquiries.<sup>1</sup> Otherwise the agreement of 1927 was confirmed, and the Indian Government agreed to continue to maintain an agent in the Union. Considerable concessions were made as to land-holding as regards lands acquired up to March 1, 1930, by companies, and it was agreed that an impartial Commission should investigate individual cases, and that on their report the Minister of the Interior should be empowered to withdraw specified areas of land from the operation of the Gold Law forbidding the occupation of land by coloured persons. This power would apply also in the future.

While matters in the Union are thus regulated on a rather narrow basis, and while Indians enjoy less privilege in the matter of immigration than do the Japanese under an agreement made informally in 1930,<sup>2</sup> their position in the other Dominions is on the whole more favourable. Immigration is shut off, and Canada unquestionably thus affords better treatment under treaty and informal agreement to Japanese than is granted to Indians. Japanese up to 150<sup>3</sup> a year new-comers are permitted entry, while Indians are entirely refused entry save for mere visits. Nor has Canada been able to induce British Columbia to accord Indians the franchise from which they are excluded by the province,

1921) has successfully excluded them Cf. Hofmeyr, *South Africa* (1931), pp. 300-305; *Official Year Book*, xvii. 1172; xviii. 1060

<sup>1</sup> Report, U G. No 23 of 1934

<sup>2</sup> *J.P.E.*, 1931, pp. 1058-70.

<sup>3</sup> *Ibid.*, 1929, pp. 614, 616 Cf. Brady, *Canada* (1932), pp. 170-4 For hostility to Indians of the Conservative Convention 1927 Platform, Dawson, *Const. Issues in Canada, 1900-1931*, pp. 372, 407, and in 1936, *J.P.E.*, 1936, pp. 291-3. In 1938 British Columbia saw demands for Asiatic exclusion from landholding, see also Angus, *Can. Bar. Rev.* ix. 1-12.

with the result that they are also excluded from the federal franchise. Otherwise the issue is not there of much concern owing to the small number of Indians resident. The same remark applies to the Commonwealth; as the result of the doctrine of inter-Imperial equality the Commonwealth, Western Australia, and Queensland have legislated to accord the vote to Indians, and the former has allowed them to receive old-age pensions. New Zealand rigidly excludes under Acts of 1920 and 1931, renewed in 1936, but does not otherwise penalise, Newfoundland has no attractions to offer, and the Irish Free State maintains the British doctrine of freedom of entry, and no discrimination save that the franchise is restricted to Irish citizens.

No doubt the matter is not wholly satisfactory. The suggestion has even been made that the day may come when India may appeal to the League of Nations to take up the issue of the right of migration, and it is possible that at some future time the activities of the League may extend beyond the present doctrine that immigration is essentially a matter of domestic jurisdiction, so that it cannot be dealt with either by the League Council or the Permanent Court of International Justice.<sup>1</sup> The most important factor in the situation is the attitude of Japan, which endeavoured to secure the right of migration as a fundamental principle recognised by the League, and which has never acquiesced in the justice of the policy of the reservation of areas by nations as their inviolable preserves, especially when, as in the case of Australia, the local population and such immigration as it permits fail to fill up the territory at any adequate rate. It is significant that one of the reasons which induced Dominion refusal to accept the Geneva Protocol of 1924 was the belief that it

<sup>1</sup> Wheaton, *International Law* (ed. Keith), i. 574, 600.

Chapter XXI. might in some measure handicap them in their maintenance of the doctrine that immigration issues were of purely domestic concern.

It is significant of the difficulty of relations between India and the Dominions that it proved impossible at Ottawa in 1932 to reach any agreements as to trade relations between these countries, though India definitely adopted the principle of a preferential agreement with the United Kingdom.<sup>1</sup> Further development of relations may doubtless be expected in the course of time.

The relation of the Dominions and India was seriously canvassed in connection with the negotiations of the Round Table Conference and the sittings of the Joint Select Committee on the Government of India Bill, 1935. The attitude of Sir S. Hoare as Secretary of State was marked by singular inability to understand or express sympathy with the Indian point of view. He reluctantly admitted that he was bound to concede the right, already admitted by the Imperial Conference in 1917, of the Indian legislature to regulate immigration of Dominion nationals, or British subjects connected with the Dominions, on the basis of reciprocity, though in fact no steps to this end have ever been taken. But he fought hard to deprive India of any right to treat Dominion nationals, who were admitted to India, in any differential manner, insisting that they should be treated on the very favoured terms accorded to British subjects of United Kingdom domicil. The project was happily overruled, but not until it had created a painful impression of the opposition of the Secretary of State to the

<sup>1</sup> In 1936 the Indian Assembly requested that steps be taken to terminate the operation of the Ottawa Agreement of 1932, but arrangements are under progress to substitute for it an amended version, while a separate accord is being arranged for Burma as a distinct unit with her own trade interests.

just rights of India and his desire to establish the doctrine of European superiority on racial grounds.<sup>1</sup>

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A further point won for India was the grant to ministers, as opposed to the Governor-General personally, of authority to deal with that side of external relations which concerns the relations of India to other members of the British Commonwealth. This puts the Government of India in an effective position to deal with full authority with the Union of South Africa or the other Dominions. Had the matter been entrusted to the hands of the Governor-General, he must have been held by the Dominion Governments to be speaking merely as a British representative, and the Dominions are fully accustomed to the system of British concession to their demands. As matters now stand, the matters at stake become definitely a matter in which Britain has no direct interest, once federation takes effect.

Unfortunately there is obvious in the Union of South Africa a growing hostility to Indians, seen in the measure, put forward with strong Nationalist support in the ranks of the United party, to forbid the marriage of Europeans and Indians.<sup>2</sup> A measure of this kind treating Indians as out-castes unfit to mingle their blood with that of Europeans, many of whom have some strain of negro blood, is plainly utterly unwise. That intermarriages between different races are open to objection is a perfectly tenable doctrine; that they should be legally forbidden without regard to the stage of civilisation of the races concerned is an indefensible doctrine. In the long run it is certain that peoples between whom marriage is forbidden on the score of racial inferiority

<sup>1</sup> See Keith, *Const. Hist. of India, 1600-1935*, pp. 237 f., 282 ff., 366, 459.

<sup>2</sup> Prohibition of Mixed Marriages (European, Asiatics, and Natives) Bill. It was probably motived as a little window-dressing as against the Nationalist party at the next election.

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The matter stands rather on a different footing when the question is raised as to the right of Indians to claim recognition in the Union of the legal effects of non-monogamous marriages. In the case of Natal, statutory recognition has been accorded to certain forms of Indian marriage as part of the former policy of encouraging immigration under indenture. But to claim that the Union should go further as a matter of general law is illegitimate. The Union legal system, like the British, is based on the existence of a certain type of society which accepts as a fundamental doctrine Christian marriage of the monogamous type, and to ask it to adapt its tenets to a different conception of marriage would be quite illegitimate. Hence, apart from express statutory provisions for Natal and those made as part of the arrangements for settling the conflicts between the Government and Indians immediately after the Union, the Union law refuses to treat as a wife, according

<sup>1</sup> 1929 Sc.L.T. 96. See the criticism in Keith, *Letters on Imperial Relations, 1916-1935*, pp. 339, 340.

<sup>2</sup> *MacDougall v. A. S. R. Chitnavis*, [1937] Sc.L.T. 40. See Keith, *Journ. Comp. Leg.* xix. 123.

to law, a woman merely married in India by Hindu rites which admit polygamy.<sup>1</sup>

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What applies to India, of course, applies equally to Burma, in view of the fact of the erection of Burma into a distinct unit.<sup>2</sup> As in India, the ministry, as opposed to the Governor acting in his discretion, is the authority charged with the conduct of relations in matters affecting the Dominions, and Burmese national feeling is even stronger and more potent than in India, because the Burmans are not divided by religion or caste in the Indian manner, which renders British control much easier.

The Imperial Conference of 1937 reflected the conditions established by the Act of 1935. Speaking for British India,<sup>3</sup> Sir Muhammad Zafrullah Khan stressed, on the one hand, the fact that the Government of India remained responsible for foreign affairs and defence, but also the fact that India's ultimate equality of status justified her representation to discuss these matters with spokesmen of other parts of the Empire. India was confident that, as she progressed towards the ideal of Dominion status, some of the anomalies affecting the treatment of her nationals in other parts of the Empire would be gradually eliminated. He expressed gratitude for the courtesy and sympathy with which suggestions made on behalf of the Government of India concerning some of these matters had been received. There is, in fact, no doubt whatever that nothing is more unwise than differential treatment of Indians lawfully resident, and, even if the Indians in Canada are not vocal in demanding the franchise in British Columbia as the Prime Minister

<sup>1</sup> See *Seedat's Exors. v The Master*, [1917] A.D. 302; *Vitamin Distributors v. Chungerbryen*, [1931] W.L.D. 55. For England see Dicey and Keith, *Conflict of Laws* (1932), p. 280.

<sup>2</sup> See Government of Burma Act, 1935, operative April 1, 1937.

<sup>3</sup> Cmnd. 5482, p. 70.

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holds,<sup>1</sup> it is a mistake that it is not accorded. Sir Muhammad Zafrullah Khan pointedly referred to difficulties as regards the Crown Colonies also, and the Colonial Secretary agreed to discuss these issues.<sup>2</sup> Differentiation against British Indians in such territories is clearly a national wrong which must render loyalty to the Crown ultimately impossible, and the redress of these grievances is an essential work of statesmanship.

(7) The relation of the Dominions to the Colonial Empire is one rather of complementary than of competitive trade. Hence it has been possible for Canada to enter into trade accords with the West Indies, which have been of considerable importance for the hard-pressed colonies. Unfortunately, the outlook for that accord is not wholly promising. To the Colonial Secretary's expression of hope, at the Conference of 1937, of renewal on its expiration, Mr. Dunning, for Canada, had to indicate that, while he was by no means pessimistic about the possibility of concluding a fresh agreement which might be satisfactory to both parties, he feared that some difficulties would have to be overcome. Various suggestions have been made from time to time in favour of the attachment of the West Indian colonies to Canada, but nothing has ever come of these proposals. The strong sense of historical independence of each unit, which has prevented any serious federation movement, equally tells against any closer relation with Canada. Nor is Canada anxious to have control over areas which are essentially of non-European population.

The interest of the Dominions in colonial government has been invited through the establishment of facilities in the Dominions for the recruitment of Dominion personnel.

<sup>1</sup> *J.P.E.*, 1937, p. 292.

<sup>2</sup> *Parl. Pap. Cmd. 5482*, p. 23.

There is, however, a rather serious principle involved. How far is it proper to appoint to colonial positions men coming from Dominions whose national policy excludes the colonists, though British subjects, from entry or settlement? With the growth of national sentiment in the colonies, the anomaly will doubtless produce resentment, nor in fact can it be defended on moral grounds.

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The issue of Palestine evoked at the Conference of 1937 criticism by Sir Muhammad Zafrullah Khan, who stressed the legitimate anxiety of India for a just settlement.<sup>1</sup> It is interesting to note in the case of the Union of South Africa the usual contrast between theory and action. The Zionist movement in Palestine has stressed the insistence of General Smuts and General Hertzog on the necessity of the British Government not adopting any policy which would run counter to the mandate.<sup>2</sup> But it has omitted to note that the Union of South Africa herself, despite General Smuts' membership of the Government, has adopted a very hostile attitude towards the immigration of Jewish refugees from Germany or other parts of Europe.<sup>3</sup> In the same way Mr. Pirow has committed the Union to readiness to welcome Germany as possessed of sovereignty over African territory, but has hastily explained that the sovereignty must not be that of South-West Africa which the Union holds as her *spolia belli*, or Tanganyika which she holds to fall within her sphere of influence. Apparently, therefore, Germany must simply be content with Togoland and the Cameroons, to be surrendered mainly by France, in small part by Britain; for the Union would look with great anxiety at any occupation of Portuguese territory by Germany, such as envisaged as

<sup>1</sup> Parl Pap Cmd 5482, p. 23.

<sup>2</sup> Cf. Colonial Secretary, House of Commons, June 16, 1937.

<sup>3</sup> J.P.E., 1937, pp. 405 ff.

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XXI. possible in 1913-14 when efforts were being made to find Germany a place in the sun. The Union policy of welcoming and urging sacrifices by other States which she herself indignantly repudiates is one easy to understand, but hard to admire.

The Union, as already mentioned,<sup>1</sup> has the ambition of early annexation of the African Native Territories under the High Commissioner's control, and Mr. Pirow holds that native policy at least must be assimilated in other British-controlled territories south of the Sudan, excluding West Africa. Australia has the ambition to control the New Hebrides, so far as Britain shares condominium therein with France, and the issue was raised at the Imperial Conference of 1937. There seems no sufficient ground for such a change of control, especially as New Zealand as well as the Commonwealth is concerned, and by no means all of the British element in the islands is anxious to fall under the control of a Dominion Internationally, the present arrangement under which the British Government exercises through the High Commissioner the control which it shares with France is much easier to operate. Transfer, therefore, has not yet been accorded. In fact, the Commonwealth Government would probably find the task of administering an unsatisfactory one, since French ideas differ greatly from British, and the ministry would very likely suffer frequent embarrassment from Parliamentary interpellations, based on the almost universal failure in the Commonwealth to realise that, in dealing with great powers of equal status in international law, there is no room for the maxim *sit pro ratione voluntas*.

As already mentioned, such colonies or islands as can properly be transferred have been assigned to the Common-

<sup>1</sup> See Chapter XIV (5), *ante*.

wealth<sup>1</sup> and New Zealand<sup>2</sup> to control, together with Antarctic territories of great area if minor apparent value. Fiji is still retained, with the other islands of the Western Pacific High Commission, under British control. It is important to note that to hand over these territories, without the consent of the people, through their chiefs or otherwise, to Dominion administration would be clearly improper. The parallel of the Indian States clearly applies. These territories were acquired by the Imperial Government, largely by accord with the chiefs in many instances, especially in Fiji, and these accords were certainly made on the faith of direct control by the officers of the British Government.

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XXI.  
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<sup>1</sup> See Chapter XII. (10) *ante*.

<sup>2</sup> See Chapter XX. (3) *ante*.



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